FILE COPY

Office-Supreme Court
FILED
JAN 31 1969
JOHN F. DAVIS, CLE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 44

LIVINGSTON ANTI-MERGER COMMITTEE,
Appellant,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court
for the District of Columbia

JURISDICTIONAL STATEMENT FOR LIVINGSTON ANTI-MERGER COMMITTEE

VALENTINE B. DEALE
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorney for Livingston
Anti-Merger Committee

Washington, D. C. · THIEL PRESS · 202 · 393-0625

TABLE OF CONTENTS

	PAGE
OPINION AND ORDERS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	4
QUESTIONS PRESENTED	6
STATEMENT OF CASE	7
1. Background of Facts and Law	8
2. Administrative Hearing, Examiner's Report and Committee's Exceptions	13
3. Commission Reports of March 31, 1966	15
4. Commission Reports of November 30, 1967 and April 11, 1968	16
5. Opinion of District Court	17
THE QUESTIONS ARE SUBSTANTIAL	18
1. Questions of Title and Jurisdiction	18
2. Question of Statutory Prohibitions Against Merger and Mortgage in the Federal Charter	20
3. Question of Adequacy of Administrative Proceeding and Judicial Review	24
CONCLUSION	27
APPENDIX	29

INDEX TO CITATIONS

CASES:

American Ship Building Co. v. N.L.R.B., 380 U.S. 300	27
B. & O. R. Co. v. United States, 386 U.S. 372	4
Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469	20
Case, et al. v. Los Angeles Lumber Products Co., Ltd., 308 U.S. 106	19
Cromwell v. County of Sac., 94 U.S. 351	19
Isbrandtsen Co., Inc. v. United States, et al., 96 F. Supp. 883, aff'd 342 U.S. 950	26

PAGE

Landell v. Northern Pacific Ry. Co., 122 F. Supp. 253, aff'd 96 U.S. App. D.C. 24, 223 F.2d 316, cert. denied 350 U.S. 844 18

Muskrat v. United States, 219 U.S. 346 19

Northern Pacific Ry. Co. v. Boyd, 170 Fed. 779, aff'd 177 Fed. 804; 228 U.S. 482 ..... 10, 18, 22

Reynolds v. Stockton, 140 U.S. 254 19

Schmidt v. United States, 102 F.2d 589, appeal applications denied 308 U.S. 508 18

Schwabacher v. United States, 334 U.S. 182 26

Union Pacific R. Co. v. Mason City & Fort Dodge R. Co., 199 U.S. 160 22

United States v. Carolina Freight Carriers Corp., 315 U.S. 475... 25

United States v. Northern Pacific R. Co., 95 Fed. 864, aff'd 177 U.S. 435 ..... 9, 21

United States v. Northern Pacific Ry. Co. (the *Land Grant* case), 311 U.S. 317 ..... 9-10, 18, 19

STATUTES:

Act of July 2, 1864, 13 Stat. 365 ..... 4, 6, 8-9, 16, 20, 21, 60

Joint Resolution of May 31, 1870, 16 Stat. 378 ... 4, 9, 20, 21, 74

Act of March 3, 1871, 16 Stat. 573 ..... 5, 22, 83

Proviso in Act of July 1, 1898, 30 Stat. 597 at 621 ... 4, 12, 19, 76

Act of June 25, 1929, 46 Stat. 41 ..... 4-5, 12-13, 19 77

Act of July 10, 1962, 76 Stat. 142 ..... 5, 22, 84

Administrative Procedure Act, as revised and codified:
5 U.S.C. § 556(b) and (d) (80 Stat. 386) 5, 25, 86
5 U.S.C. § 557(c) (80 Stat. 387) 5, 25, 87
5 U.S.C. § 706 (80 Stat. 393) 5, 88

28 U.S.C. § 1253 4
28 U.S.C. § 2284 3
28 U.S.C. § 2323 3
28 U.S.C. § 2325 ..... 3, 4

Interstate Commerce Act, 49 U.S.C. 1, *et seq.*
Sec. 5(2) 24
Sec. 20a and b 24
Sec. 5(2)(a) and (b) 5, 7, 19, 24, 89

PAGE

Sec. 5(2)(d) 5, 7, 19, 90
Sec. 5(11) 22-23
Sec. 20a(7) 22-23

LEGISLATION:

House Resolution No. 168, 54th Congress, 1st Session 11, 91

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No.

LIVINGSTON ANTI-MERGER COMMITTEE,

Appellant,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees.

On Appeal from the United States District Court
for the District of Columbia

JURISDICTIONAL STATEMENT FOR LIVINGSTON ANTI-MERGER COMMITTEE

OPINION AND ORDERS BELOW

The opinion of the court below, which has not yet been reported, the order of that court from which this appeal is taken, and the order of the court making corrections in its opinion are set out at Appendix A, Appendix B, and Appendix G, respectively, of the Jurisdictional Statement of the United States in the companion appeal of *United States v. Interstate Commerce Commission, et al.*, docketed in this Court on January 3, 1969 as No. 899. That part of the opinion of the court below particularly dealing with the conten-

tions of appellant Livingston Anti-Merger Committee is set out at Appendix A hereto.

The pertinent orders, decisions and reports of the Interstate Commerce Commission involved in this appeal are as follows:

Report, Certificate and Order recommended by Hearing Examiner, August 24, 1964. Full text in record of companion appeal No. 899; excerpts particularly pertinent to this appeal at Appendix B hereto.

Report of the Commission on Petitions for Rehearing, March 31, 1966 (328 I.C.C. 205). Full text at Appendix C hereto.

Report of the Commission, March 31, 1966 (328 I.C.C. 460). Full text at Appendix C of Jurisdictional Statement in companion appeal No. 899.

Report of the Commission on Reconsideration and Further Hearing, November 30, 1967 (331 I.C.C. 228), together with Order on Reconsideration. Full text at Appendix D of Jurisdictional Statement in companion appeal No. 899.

Second Report of the Commission on Reconsideration, April 11, 1968 (333 I.C.C. 869), together with accompanying Order. Full text at Appendix E of Jurisdictional Statement in companion appeal No. 899.

Third Report of the Commission on Reconsideration, June 17, 1968 (333 I.C.C. 391). Full text at Appendix F in companion appeal No. 899.

JURISDICTION

This appeal is from the final order of a three-judge District Court for the District of Columbia, entered November 20, 1968, affirming orders of the Interstate Commerce Commission authorizing what has come to be known as the Northern Lines merger. The Commission's orders authorized the merger of Great Northern Railway Company, Northern

Pacific Railway Company, Chicago, Burlington & Quincy Railroad Company, and Pacific Coast R.R. Co. into a new Delaware corporation, namely, Great Northern Pacific & Burlington Lines, Inc.; the orders also authorized related transactions, including the issuance of mortgage bonds on the merged properties. The three-judge court was designated in accordance with 28 U.S.C. § 2284 and § 2325. Notice of appeal was filed in the District Court for the District of Columbia on December 12, 1968.

The suit in the District Court arose on complaint by the United States, acting through the Department of Justice, to enjoin, annul and set aside the Commission's merger authorization orders. Appellant, who had been an intervenor in opposition to the application for merger authorization in the antecedent administrative proceeding under the Interstate Commerce Act and Administrative Procedure Act, intervened in the suit as a plaintiff pursuant to 28 U.S.C. § 2323. Appellant's complaint, like the one of the United States and those of other intervening plaintiffs,[1] sought to enjoin, annul and set aside the merger authorization orders. In affirming said orders, the three-judge District Court dismissed all the complaints and denied the prayers therein.

Thereafter, upon the filing of their notices of appeal, the United States and the City of Auburn, one of the intervening

---

[1] In addition to Appellant, there were the following other intervening plaintiffs: State of Washington; Public Service Commission of the State of Minnesota; Board of Railroad Commissioners of the State of Montana; City of Auburn; and Charles E. Brundage, Bradford F. Story, Samuel C. Williams, Jr., Warren Clark, constituting The Northern Pacific Stockholders' Protective Committee.

There were also the following intervening defendants: Great Northern Railway Company; Northern Pacific Railway Company; and their affiliates Chicago, Burlington & Quincy Railroad Company; Pacific Coast R. R. Co.; Spokane, Portland and Seattle Railroad Company; and Great Northern Pacific & Burlington Lines, Inc.; other intervening defendants: Chicago, Milwaukee, St. Paul and Pacific Railroad Company; 230 Pacific Northwest Shippers; and Public Utility Commissioners of Oregon.

plaintiffs in the court below, filed with this Court on December 5, 1968 applications for stay of the effectiveness of the Commission's merger authorization orders; by memorandum filed December 12, 1968, appellant supported the applications; and on December 16, 1968, this Court ordered the stay and it continues in effect until further Court order.

The jurisdiction of the Court to hear this appeal is conferred by 28 U.S.C. § 1253 and § 2325. *B. & O. R. Co. v. United States,* 386 U.S. 372.

STATUTES INVOLVED

The following federal statutes and joint resolution of Congress are involved in this appeal, and the full text or pertinent parts thereof are set out at Appendices D through J, hereto:

> An Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from Lake Superior to Puget's Sound, on the Pacific Coast, by the Northern Route, approved July 2, 1864, 13 Stat. 365 (App. D).
>
> A Resolution authorizing the Northern Pacific Railroad Company to issue its Bonds for the Construction of its Road and to secure the same by Mortgage, and for other Purposes, approved May 31, 1870, 16 Stat. 378 (App. E).
>
> Proviso in "An Act Making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-nine, and for other purposes," approved July 1, 1898, 30 Stat. 597 at 621 (App. F).
>
> An Act To alter and amend an Act entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route," approved July 2, 1864, and to alter and amend a joint resolution entitled "Joint resolution authorizing the Northern Pacific Railroad Company to issue its bonds for the

construction of its road and to secure the same by mortgage, and for other purposes," approved May 31, 1870; to declare forfeited to the United States certain claimed rights asserted by the Northern Pacific Railroad Company, or the Northern Pacific Railway Company; to direct the institution and prosecution of proceedings looking to the adjustment of the grant, and for other purposes, approved June 25, 1929, 46 Stat. 41 (App. G).

An Act to incorporate the Texas Pacific Railroad Company, and to aid in the Construction of its Road, and for other Purposes, approved March 3, 1871, 16 Stat. 573 (App. H).

An Act to supplement certain provisions of Federal law incorporating the Texas and Pacific Railway Company in order to give certain additional authority to such company, approved July 10, 1962, 76 Stat. 142 (App. H).

5 U.S.C. § 556(b) and (d) (80 Stat. 386)–formerly § 7(a) and (c) of the Administrative Procedure Act prior to its revision and codification (App. I).

5 U.S.C. § 557(c) (80 Stat. 387)–formerly § 8(b) of the Administrative Procedure Act prior to its revision and codification (App. I).

5 U.S.C. § 706 (80 Stat. 393)–formerly § 10(a) of the Administrative Procedure Act prior to its revision and codification (App. I).

49 U.S.C. § 5(2)(a) and (b) and (d)–§ 5(2)(a) and (b) and (d) of the Interstate Commerce Act (App. J).

QUESTIONS PRESENTED

Grouped according to three underlying issues, the questions presented by appellant are as follows:

Whether Commission has jurisdiction to authorize the proposed merger.

1. Does ownership of the franchise and the right of way granted by the United States to Northern Pacific *Railroad* Company under the Act of July 2, 1864, and included in the proposed merger, continue to vest in that company, an existing federal corporation, which in no way participated in the merger application proceedings, or was ownership of the franchise and the right of way validly transferred at foreclosure sales in 1896 to the present user thereof, Northern Pacific *Railway* Company, a Wisconsin corporation and one of the merger applicants?

Whether the Commission's merger authorization is lawful in face of statutory prohibitions against merging and mortgaging one of the roads involved in the proposed merger.

2. Are the statutory prohibitions against merger and mortgage without Congressional consent which were interlocked with the federal grant of the franchise and right of way to *Railroad* lawful obligations and restrictions binding upon *Railway* and the Commission?

Whether the Commission and the District Court gave adequate consideration to the foregoing issues and related questions.

3. In the administrative and judicial proceedings below, did the Commission and the District Court comply with the procedural requirements of the Interstate Commerce Act and the Administrative Procedure Act as well as the principles of administrative procedure and judicial review set forth in decisions of this Court?

STATEMENT OF CASE

The Livingston Anti-Merger Committee, an association of citizens residing in the City of Livingston, Montana, and neighboring communities, including Committee Chairman Warren R. McGee, has opposed the Northern Lines merger from the outset of the administrative proceeding before the Interstate Commerce Commission. The Committee opposes the merger because of the adverse social and economic effects upon the City of Livingston and the surrounding area which the merger is expected to leave in its wake should it become a reality.

In the present appeal, the Committee has grounded its opposition on three issues. The first of these issues is jurisdiction, the Committee claiming the Commission has no jurisdiction to approve the proposed merger. The Commission's power to authorize rail mergers extends only to properties belonging to the merger applicants and any non-applicant petitioning to be included in the merger. 49 U.S.C. § 5(2)(a) and (b) and (d) (App. J, *infra*, p. 89). With respect to the proposed merger, ownership of the federally granted franchise and main line right of way now used and operated by Northern Pacific *Railway* Company and included in the merger package continues to vest in the existing federal corporation and original grantee, Northern Pacific *Railroad* Company, which is neither a merger applicant nor a petitioner for inclusion in the merger.

The second issue is the lawfulness of the proposed merger apart from the matter of jurisdiction. The Committee claims that the statutory prohibitions against merger and mortgage without Congressional consent which were interlocked with the grant of the franchise and right of way in the federal charter remain as encumbrances upon the road and are legal restrictions binding upon Northern Pacific Railway Company,

even assuming the validity of its claim of title to the franchise and right of way through the 1896 foreclosure proceedings, and upon the Commission itself. The Committee has persisted in its contentions on the above two issues throughout the administrative proceeding from the time of its petition for leave to intervene (September 25, 1961) to its petition for reconsideration (January 18, 1968), and it carried forward its contentions in the appeal to the court below.

The third issue in this appeal relates to compliance with standards for administrative proceedings and for judicial review as prescribed by statutes and by decisions of this Court. As it argued in its appeal to the court below, the Committee insists that the Commission did not meet such standards for administrative proceedings; and in this appeal, it also contends that the court below did not properly fulfill its obligation of judicial review.

1. BACKGROUND OF FACTS AND LAW

a. Act of July 2, 1864, 13 Stat. 365 (App. D, *infra*, p. 60). By this Act, the United States created the Northern Pacific Railroad Company as "a body corporate and politic, in deed and in law" and authorized and empowered the company "to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with appurtenances, namely, beginning at a point on Lake Superior in the State of Minnesota or Wisconsin; thence westerly . . . to some point on Puget's Sound." The United States vested the company with all the powers, privileges, and immunities to carry into effect the purposes of the Act, otherwise known as the company's federal charter. Under the Act, too, the United States gave to the company some 43 million acres of nonmineral public lands to aid in the construction of the railroad and telegraph line and a tax exempt right of way 400 feet in width and approximately 2100 miles in length.

The provisions of the Act of July 2, 1864, also imposed certain obligations and restrictions. To make sure that there would always be in existence a continuous railroad line for the use of the United States, particularly in time of war, the Act, at Section 10, prohibited a mortgage on the road without the consent of Congress. Further, Sections 1 and 3 of the Act constitute, under court decision, a prohibition against the merger of Railroad into another company. *United States v. Northern Pacific R. Co.*, 95 Fed. 864 at 876-877, aff'd 177 U.S. 435. Specific obligations and restrictions imposed by the federal charter also encompass those pertaining to the requirement of a "continuous" line (Section 1), use of right of way for railroad purposes (Sections 1, 2, 3, 11 and 20), reservation to the United States of certain mineral rights (Section 3), availability of railroad to the United States for "postal, military, naval, and all other government service" (Sections 3, 11 and 20), ceiling limitation upon rates which may be charged to the government (Section 5), and reservation by Congress to add to, alter, amend or repeal the federal charter at any time (Section 20).

b. Joint Resolution of May 31, 1870, 16 Stat. 378 (App. E, *infra*, p. 74). By this Resolution, Congress authorized the Northern Pacific Railroad Company "to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation." The Joint Resolution also provided for mortgage enforcement by foreclosure in the event of default. Northern Pacific *Railway* Company's claim to Northern Pacific *Railroad* Company's franchise and right of way through foreclosure proceedings in 1896 is keyed to this Resolution. Appellant's position is that there was no foreclosure and sale of the franchise and right of way in the 1896 foreclosure proceedings within the meaning of the Joint Resolution or within applicable law which would permit Railway's takeover of Railroad's title to the franchise and right of way. For reservation of this Court about the validity of the 1896 foreclosure proceeding, see *United States*

v. Northern Pacific Ry. Co. (the *Land Grant* case), 311 U.S. 317 at 340-342.

c. **"Foreclosure" proceedings in 1896.** In 1896, the Northern Pacific Railway Company, a Wisconsin corporation, which owned at the time, and since, approximately 97% of the stock of Northern Pacific *Railroad* Company and virtually all of its bonds, "bought in" Railroad's properties at foreclosure sales. The private nature of the foreclosure proceedings (the United States was not a party) is evidenced in decisions of the Circuit Court, the Court of Appeals and this Court in *Northern Pacific Ry. Co. v. Boyd*, 170 Fed. 779; aff'd 177 Fed. 804; aff'd 228 U.S. 482. The Circuit Court granted Boyd, a creditor of Northern Pacific *Railroad* Company, full recovery and overruled the defenses that Railroad was bankrupt and that there had been a foreclosure adjudication in 1896. The Circuit Court recognized that if there had been an actual foreclosure Boyd would have had no standing as a creditor; in allowing judgment for Boyd, it found there had been no real foreclosure (170 Fed. at 801-802). In affirming, the Ninth Circuit Court of Appeals adopted the language of the Circuit Court and ruled "the foreclosure which was had was a foreclosure in form and not in substance" (177 Fed. at 818). According to the opinion of this Court, the agreed value of certain of Railroad's properties "acquired" by Railway was $345 million, or more than $100 million in excess of Railroad's total outstanding liabilities. In affirming the decisions of the two lower courts, this Court indicated that the contract reorganization by consent decree was no different than one "effectuated by a private sale" (228 U.S. at 502); it expressly held that there was no adversary foreclosure proceeding and stated that by consent Railway

> ". . . became the representative of both parties in interest. In such a situation there was nothing to litigate, and so the demurrer to the bill was withdrawn. An answer was immediately filed admitting all the allegations of the bill. On the same day, 'no one opposing,' a decree of foreclosure and sale was entered." 228 U.S. at 506.

d. House Resolution No. 168, 54th Congress, 1st Session (App. K, *infra*, p. 91). While the consent foreclosure proceedings before the Federal District Court for the Eastern District of Wisconsin were pending in 1896, Railway itself acknowledged that Congressional authorization was necessary to enable it to acquire title to Railroad's franchise and right of way at the "foreclosure" sale. At the hearing of May 15, 1896, on House Resolution No. 168—one of several resolutions introduced into the 54th Congress "to facilitate the reorganization of the Northern Pacific Railroad Company" which was sought by Railway—Mr. Victor Morawetz, counsel for the Reorganization Managers and a director of Railway, and Mr. Alexander T. Britton, an attorney for Railway, testified that it would be impossible for the franchise and transcontinental main line of Railroad to be transferred to Railway at the foreclosure sale then scheduled for the month of July, 1896, without the kind of Congressional authorization provided for in the House Resolution. The testimony of Mr. Britton before the House Committee on the Judiciary in response to questions of Chairman David B. Henderson and Representative Thomas Updegraff was specific (unprinted hearings in files of National Archives and Records Service, pp. 11-12 of second transcript).

"*Mr. Updegraff:* When is the Northern Pacific Railroad to be sold?

Mr. Britton: The sale takes place in July.

Mr. Updegraff: Under the law, as it now stands, in case of sale, cannot they include the franchises?

Mr. Britton: They cannot.

Mr. Updegraff: Can you make a valid sale that does not include the franchises unless you get this legislation?

Mr. Britton: No, sir; we cannot.

The Chairman: You mean to say that you cannot sell the property without this?

Mr. Britton: No, sir."

Though it failed to secure the sought-after enabling legislation, Railway nevertheless went ahead with the consent foreclosure proceedings and since then, has been constrained to base its claim of title to the federally granted franchise and right of way upon these proceedings.

e. Contemporary and Recent Expressions by Congress on Title Question. The contemporary view of Congress toward Railway's takeover of Railroad's properties through the "foreclosure" proceedings of 1896 was evidenced by a proviso in the Act of July 1, 1898, 30 Stat. 597 at 621 (App. F, *infra*, p. 76). This act, making appropriations for sundry civil expenses of the government for fiscal year ending June 30, 1899, included consideration of land grants to Northern Pacific Railroad Company, and in that connection, Congress made the following proviso:

> "*And provided further*, That nothing herein contained shall be construed as intended or having the effect to recognize the Northern Pacific Railway Company as the lawful successor of the Northern Pacific Railroad Company in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company, under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company in the courts of the United States, but the legal question whether the said Northern Pacific Railway Company is such lawful successor of the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provisions of this Act, and nothing in this Act shall be construed as enlarging the quantity of land which the said Northern Pacific Railroad Company is entitled to under laws heretofore enacted."

The most recent pronouncement by Congress on the question of title to the right of way federally granted to Northern Pacific Railroad Company was the Act of June 25, 1929, 46 Stat. 41 (App. G, *infra*, p. 77). In that Act, which was for the purpose of removing the cloud upon the title of lands belonging to the United States as a result of claims

by Railroad and Railway, Congress continued to refuse recognition of Railway's title in the right of way and continued to affirm and reserve the rights of the United States under the Act of July 2, 1864, and the Joint Resolution of May 31, 1870. By referring in the Act of June 25, 1929, to the "present title" in the federally granted right of way as belonging to Railroad *or* Railway *or* any subsidiary of either or both, Congress effectively asserted that so far as it was concerned the very title question being raised in this appeal has not been settled. Section 4 of the Act provides:

> "Sec. 4. The provisions of this Act shall not be construed as affecting the present title of the Northern Pacific Railroad Company or its successors, the Northern Pacific Railway Company, or any subsidiary of either or both, in the right of way of said road or lands actually used in good faith by the Northern Pacific Railway Company in the operation of said road."

2. ADMINISTRATIVE HEARING, EXAMINER'S REPORT AND COMMITTEE'S EXCEPTIONS

The Committee made its presentation for the hearing record at Billings, Montana, on June 22, 1962 (Record on companion appeal No. 899, Hearing Tr. pp. 14014-14079). Through its witnesses, ten in all, the Committee submitted economic impact type data, which the hearing examiner admitted into evidence, and it also sought to introduce into evidence, through oral and written testimony of an expert witness, data in support of its position on the twin issue of title and jurisdiction and on the issue of statutory prohibitions against merger and mortgage of the federally granted franchise and right of way in the absence of Congressional consent (*ibid.*, pp. 14060-14070). The Committee's position on the second issue had been specifically identified in its petition for leave to intervene.

The examiner sustained the merger applicants' objection to the proffered testimony of the Committee's expert witness on the grounds that the testimony amounted to a legal argu-

ment and that therefore it should be advanced in a legal brief. The examiner dismissed the objection of the Committee that at the hearing on December 8, 1961, the President of the Northern Pacific Railway Company, Robert S. Macfarlane, read into evidence a statement, including citations of statutes and court decisions, which was directed toward showing his company's right to proceed with the merger irrespective of the prohibitions against merger and mortgage in the federal charter (*ibid.*, pp. 1190-1193). At the same time, the examiner denied the Committee's motion to strike Mr. Macfarlane's testimony. While recognizing that a brief is no substitute for evidence in the record, the Committee did file a brief on January 3, 1963 as had been permitted by the examiner on the general subject matter of the rejected testimony of its expert witness (Record in companion case No. 899).

In his advisory report to the Commission, dated August 24, 1964, the examiner acknowledged the Committee's challenges to the Commission's jurisdiction and to its authority, apart from jurisdiction, to approve the proposed merger. He dealt with the challenges by a disclaimer of responsibility for determining who has title to the properties in the proposed merger so long as the properties are claimed by and in possession of the applicant carriers, by peremptory dismissal of enumerated contentions of the Committee as being without merit, and by recitation of and uncritical reliance upon general, unevaluated propositions, inclusive of the views of Mr. Macfarlane as expressed in his testimony of December 8, 1961 (App. B, *infra*, pp. 34, 37-41).

The Committee filed its exceptions to the hearing examiner's report on January 11, 1965, and carried forward its position that the Commission lacked jurisdiction to approve the merger since title to the federally granted franchise and right of way remains vested in Northern Pacific *Railroad* Company and that the provisions of the federal charter continue to be legal bars against merger and mortgage in the absence of Congressional consent (Record in companion case No. 899).

3. COMMISSION REPORTS OF MARCH 31, 1966

On March 31, 1966, the Commission handed down two reports on the Northern Lines merger applications. 328 I.C.C. 205 (App. C, *infra*, p. 42) and 328 I.C.C. 460 (App. C to Jurisdictional Statement in companion case No. 899). The main report concluded that the merger would not be consistent with the public interest, and the merger applications were denied. The report gave no consideration to the jurisdictional issue raised by the Committee; nor did it give any consideration to the issue of statutory prohibitions in the federal charter. Rather, the Commission's report took for granted that all of the rights to the properties of Northern Pacific Railroad Company "were acquired by Northern Pacific [Railway Company] at foreclosure and sequestration sales following foreclosure in 1896 of mortgages placed on the railroad and land grant by the federal corporation." 328 I.C.C. 460 at 465 (App. to Jurisdictional Statement in companion appeal No. 899, p. 61 at 70).

The Commission's other report of March 31, 1966 (328 I.C.C. 205; App. C, *infra*, p. 42) gave special treatment to the complaints by the Department of Justice, State of Minnesota Railroad and Warehouse Commission, the State of Washington and the Public Utility Commissioner of Oregon that they were deprived of a full and fair hearing. The first three alleged that the examiner was biased and prejudiced against intervenors who opposed the application in whole or in part, and that bias was displayed frequently in his conduct of the hearings and in statements in his report (App. C, *infra*, pp. 42-43). The report noted, too, that the Committee charged the hearing examiner on brief with possible "prejudgment" (*ibid.*, p. 43, footnote 2; p. 46). In the course of reaching the conclusion that a "full and fair hearing wholly within the requirements of fundamental law was accorded all parties" (*ibid.*, p. 59), the Commission upheld the hearing examiner's rejection of the testimony of the Committee's expert witness on the jurisdiction, title and federal charter issues. Against the charge of "double standards" as to receiv-

ing legal argument in evidence—a charge made by the Department of Justice—the Commission delved into rules of evidence for what it considered to be the "complete answer"; it observed that there had been no objection to Mr. Macfarlane's redirect testimony, which related to matters first raised on cross-examination, whereas there had been objection to the testimony of the Committee's witness (*ibid.*, p. 53).

4. COMMISSION REPORTS OF NOVEMBER 30, 1967 AND APRIL 11, 1968

Following a rehearing, which had been opposed by the Committee, the Commission issued its Report on Reconsideration and Further Hearing, dated November 30, 1967. This report approved the merger with certain conditions. Once more there was nothing in the report which suggested that the Commission ever gave consideration to the issues which the Committee carried forward from the start of the administrative proceeding and which are principal subjects of this appeal. Presumably, the Committee's contentions were covered by the following catch-all language in the Commission's report: "Any contentions and arguments not specifically discussed herein have been considered and found without material significance." 331 I.C.C. 228 at 290 (App. to Jurisdictional Statement in companion appeal No. 899, p. 245 at 345).

In its petition for reconsideration filed January 18, 1968, the Committee reasserted various economic impact type of contentions and also reaffirmed its position as to the applicability of the statutory prohibitions against merger and mortgage in the federal charter (Record of companion case No. 899). The Commission's response, in its Second Report on Reconsideration, dated April 11, 1968, gave heed to the Committee's economic impact arguments but once again ignored the Committee's contentions concerning the statutory prohibitions in the Act of July 2, 1864. 331 I.C.C. 869 at 871-872 (App. of Jurisdictional Statement in companion appeal No. 899, p. 463 at 467-469).

5. OPINION OF DISTRICT COURT

In its opinion of November 20, 1968 affirming the Commission's merger authorization orders and dismissing the complaints of the several plaintiffs seeking to enjoin, annul and set aside said orders, the court below acknowledged the title issue raised by the Committee and, after observing that it was one of "great magnitude" with a history "long in time and complicated in nature," the court chose to avoid deciding the issue on the merits and contented itself with the conclusionary statement that "the Commission did not err in refusing to disapprove the merger because of the Committee's challenge" (App. A, *infra*, pp. 31-32). For the purpose of the merger proceeding, resolution of the title issue in the court's opinion was not required. Although it reached the conclusion that there was no requirement to go into the title question, the court below recognized that should the title question be gone into later, some other result than the one now accepted by the Commission and itself might be proved out. In such a circumstance, as the court below saw it, the court which found a different result would have to deal with its effects upon the then status of the merger (*ibid.*, p. 32).

In addition to challenging the jurisdiction of the Commission on the basis of the title issue, the Livingston Anti-Merger Committee contended in its appeal to the court below that the statutory prohibitions in *Railroad's* federal charter against merger and mortgage of the road in the absence of Congressonal consent preclude the lawfulness of a merger authorization inasmuch as the prohibitions are binding both on *Railway*, whose interests were derived in foreclosure proceedings, and on the Commission, which is bound by the provisions of a railroad company's federal charter. With respect to this material issue, the court below had nothing to say. The court below was also silent on the remaining contention of the Committee, that is, that the administrative proceeding before the Commission did not meet the procedural standards of statutory and case law.

THE QUESTIONS ARE SUBSTANTIAL

The nature of the proposed merger and its magnitude have been concisely noted in the Jurisdictional Statement of the United States in companion appeal No. 899. For present purposes, no additional description appears indicated. It is sufficient to state that the far reaching economic and social implications of the proposed merger upon individuals and communities, both rural and urban and large and small, particularly in the northern tier region, contribute to the substantiality of the questions raised in this appeal. Further, the questions themselves are important from the standpoint of the proper use of regulatory authority and the proper exercise of the supervisory powers of the courts.

1. QUESTIONS OF TITLE AND JURISDICTION

There has never been an adjudication of Railway's claim of title to the franchise and main line right of way federally granted to Railroad and now included in the proposed merger. Though there have been references to the title *in* litigation, the question of Railway's claim of title has never been the *subject* of litigation. The cases cited by the court below are illustrative of this point, namely, *United States v. Northern Pacific Ry. Co.* (the *Land Grant* case), 311 U.S. 317 at 328; *Northern Pacific Ry. Co. v. Boyd,* 228 U.S. 482 at 502; and *Landell v. Northern Pacific Ry. Co.,* 122 F. Supp. 253, aff'd 96 U.S. App. D.C. 24, 223 F.2d 316, cert. denied 350 U.S. 844. None of these three cases adjudicated the question of title to the franchise and main line right of way. In the *Boyd* case, the question before the court was not one of title but of creditors' rights. This Court's passing reference to Railroad's divestiture of title was an assumption; it was not a holding; the isolated observation was not necessary to decision. Nor was the issue of title litigated in the *Land Grant* case.[2] In the *Landell* case, the court, without trial,

[2]In *Schmidt v. United States,* 102 F.2d 589, appeal applications denied, 308 U.S. 508, the Court of Appeals pointed out (page 596)

entered a summary judgment under Rule 56 of the Federal Rules of Civil Procedure dismissing the complaint on the ground of laches.

The lack of a judicial determination complements Congress' position of viewing the title question as open and of not accepting Railway's claim. In this regard, reference is once again made to Section 4 of the Act of June 25, 1929 (*supra*, pp. 12-13) amending Railroad's federal charter and to Congress' reservation in the proviso of the Act of July 1, 1898 (*supra*, p. 12).

The necessity of answering the title question in the merger proceeding arises from its jurisdictional character. Under § 5(2)(a) and (b) of the Interstate Commerce Act (App. J, *infra*, pp. 89-90) rail mergers within the ambit of the Commission's merger authorization power must involve properties or franchises of carriers applying for merger authorization.

These provisions are supplemented by § 5(2)(d) of the Interstate Commerce Act (App. J, *infra*, p. 90) which gives the Commission authority to require the inclusion in a proposed merger of "another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion . . . ."

Since the whereabouts of present title in the franchise and right of way granted to Northern Pacific Railroad Com-

---

that by virtue of admissions in the pleadings the question of who owned the Northern Pacific franchise and main line right of way had been removed from the *Land Grant* case. Stipulations and admissions do not foreclose legal questions. Unless there is an actual controversy between adverse litigants, there is nothing upon which the judicial power is capable of acting. *Case, et al. v. Los Angeles Lumber Products Co., Ltd.*, 308 U.S. 106 at 114; *Muskrat v. United States*, 219 U.S. 346 at 361-362; *Reynolds v. Stockton*, 140 U.S. 254 at 265; *Cromwell v. County of Sac.*, 94 U.S. 351 at 353. When Railroad, the federal corporation, made pleading admissions, stipulation and disclaimer of title in the *Land Grant* case, approximately 97% of Railroad's stock was held by Railway.

pany by the Act of July 2, 1864 is critical to the Commission's jurisdiction over the proposed merger, it is the threshold question which demands an answer prior to consideration of other issues. See *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469 at 473, where this Court noted the priority which a federal court should give to an issue of jurisdiction in reviewing an agency order. The Commission avoided addressing itself to the title question; in the course of a routine description in one of its reports the Commission merely observed that Railway had acquired the rights to Railroad's federally granted properties through foreclosure proceedings in 1896 (328 I.C.C. 460 at 465; App. to Jurisdictional Statement in companion appeal No. 899, p. 61 at 70); and the court below sanctioned the Commission's circumvention.

Appeal is made to this Court to secure appropriate resolution of the jurisdictional question of who owns (as distinguished from who controls) the franchise and main line right of way granted to Northern Pacific Railroad Company by the Act of July 2, 1864. Such resolution would give heed to the Committee's fundamental challenge that there has been no legislative authority to validate the transfer of title from *Railroad*, an existing federal corporation, to *Railway*, a Wisconsin corporation, that such legislative authority is necessary to the validation of any such transfer of title, and that the Joint Resolution of May 31, 1870 cannot properly be construed as consenting to the transfer of title in the federally granted franchise and right of way by a private, voluntary transaction of reorganization under the form of foreclosure proceedings.

2. QUESTION OF STATUTORY PROHIBITIONS AGAINST MERGER AND MORTGAGE IN THE FEDERAL CHARTER

By the Act of July 2, 1864, the United States granted to Northern Pacific Railroad Company a tax exempt right of way approximately 2100 miles in length and 400 feet in width; it gave to the Company some 43 million acres in land

grants to aid in the construction of the road; and it vested the company with all the powers, privileges and immunities necessary to carry out the purposes of the Act.

By the same Act, the United States also spelled out certain obligations and restrictions relating to the kind of railroad to be built and the manner of its management, use and operation. These obligations and restrictions were part and parcel of the total package. By statute, they were interlocked with the grants of property and property rights bestowed upon the company. Among these obligations and restrictions were the prohibitions against merger and mortgage without Congressional consent. Sections 1 and 3 of the federal charter (App. D, *infra*, pp. 60-65) are the basis of the former prohibition and have been so construed in *United States v. Northern Pacific R. Co.*, 95 Fed. 864 at 876-877, aff'd 177 U.S. 435. Section 10 of the federal charter (*ibid.*, p. 11) is plain enough, stating:

> ". . . no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage, or lien made in any way, except by the consent of the Congress of the United States."

When Northern Pacific Railway Company took over the properties of the federally chartered company in the "foreclosure" proceedings of 1896, which allegedly were pursuant to the Joint Resolution of May 31, 1870 (App. E, *infra*, p. 74), it did so subject to all obligations and restrictions of the federal company.[3] Among these obligations and restrictions were the prohibitions against merger and mortgage without

---

[3] In testimony before the Joint Congressional Committee on the Investigation of the Northern Pacific Railroad Land Grants, 68th Congress (pursuant to Public Resolution No. 24, approved June 25, 1924), Alexander Britton, counsel for the Northern Pacific Railway Company, stated (page 309 of Hearing Record) that "as long as it [Railway] operates over the rails which were built by aid of grants of Congress, I think it recognizes and is properly subject to all the limitations and liabilities and obligations imposed upon the original company by the granting act."

Congressional consent. Apart from any question about transfer of ownership or title, whatever interests were derived by *Railway* in *Railroad's* franchise and right of way remained encumbered with the original statutory obligations and restrictions. Stepping in the shoes of the federal corporation, Railway became subject to the obligations and restrictions of the federal charter. *Union Pacific R. Co. v. Mason City & Fort Dodge R. Co.*, 199 U.S. 160 at 169-171. This general principle of law would appear to be particularly applicable when the take-over transaction, while in the form of foreclosure proceedings, was in reality a private, voluntary transfer among parties dealing with themselves. See decisions in the *Boyd* case, *supra*, p. 10.

The special character of obligations and restrictions in a federal charter of a rail carrier is indicated, too, by Congress, the Commission and the Department of Justice. Those obligations and restrictions are subject to change only by specific action of Congress, and they are not comprehended by the Commission's "exclusive and plenary" authority under § 5(11) of the Interstate Commerce Act or by the Commission's "exclusive and plenary" jurisdiction under § 20a(7) of the Act.

Consider the July 10, 1962 amendment to the 1871 federal charter of the Texas and Pacific Railway Company removing from its charter a limitation upon consolidating with other railroads and also changing a ceiling limitation upon its capital stock (App. H, *infra*, pp. 83-85). Under the provisions in its federal charter prior to the amendment, the Texas and Pacific Railway Company was precluded from consolidating with another carrier unless it was one "on the route prescribed in the first section of this Act," and the Texas and Pacific's capital authorization was limited to $75 million. The 1962 amendment eliminated the "on the route prescribed" limitation, increased the company's capital authorization to $100 million, and specifically subjected to the Interstate Commerce Act all of the company's power and authority previously granted by federal charter and amendments

thereto. In commenting on the legislation which eventuated in the 1962 amendment, House Report No. 1813, 87th Cong., 2d Sess., states at page 2:

> "The primary purpose of this change in the charter is to put the railway on the same footing with the other railroads in the matter of acquiring securities or property of other railroads, always subject, of course, to Interstate Commerce Commission control." See Senate Report No. 1565, 87th Cong., page 2.

The House Report also states on the same page:

> "The 'route prescribed' is defined in the act as 'the most direct and eligible route' between Marshall, Tex. and San Diego, Calif. (Actually the T. & P. was extended only as far as El Paso, Tex.)
>
> "The quoted language makes it doubtful that the T. & P. could acquire the securities or property of, or trackage rights over, other railroads with which the T. & P. connects unless those railroads happen to run in a generally easterly-westerly direction, or in other words, along the 'route prescribed.' Generally in such cases, all other railroads are simply limited by the Interstate Commerce Act, and not so restricted by provisions such as those above quoted."

In supporting the legislation which preceded the actual amendment, the Interstate Commerce Commission offered no suggestion that its authority and jurisdiction under § 5(11) and 20a(7) of the Interstate Commerce Act made it unnecessary to amend the federal charter of the Texas and Pacific Railway Company. By letter of April 18, 1962, the Commisletter of April 18, 1962, the Commission's Committee on Legislation wrote to the Chairman of the House Interstate and Foreign Commerce Committee supporting the legislation and saying in part as follows (House Report, *ibid.*, pp. 3-4):

> "The apparent intent of . . . section [3] of the proposed amendment, is that the Texas & Pacific shall be subject to the same kind and measure of regulation by the Commission as railroads organized under State charters. To the extent that other carriers by

> railroad are not limited as to the carriers whose stock or properties they may acquire, subject to the provisions of the Interstate Commerce Act, removal of the limitation as to the Texas & Pacific, subject to such provisions, would be consistent with such intent."

Commenting on the same legislation, the Department of Justice, by letter of May 16, 1962, from the Deputy Attorney General to the House Committee Chairman, concurred in the above reasoning (House Report, *ibid.*, p. 5).

The parallel between the limitations on consolidation and capital structure set out in the charter of the Texas and Pacific Railway Company and the prohibitions against merger and mortgage set out in the charter of Northern Pacific Railroad Company is evident. The necessity in 1962 of Congress amending the 1871 federal charter of the Texas and Pacific Railway Company to accomplish objectives of that company is equally present in the case of the 1864 charter of the Northern Pacific Railroad Company if the proposed merger is to be lawful.

3. QUESTION OF ADEQUACY OF ADMINISTRATIVE PROCEEDING AND JUDICIAL REVIEW

Section 5(2)(b) of the Interstate Commerce Act obligates the Commission as a prerequisite to authorizing a rail merger to make a finding that the proposed transaction is within the scope of § 5(2)(a), the latter provision requiring that the properties in the proposed merger be owned by the merger applicants (App. J, *infra*, pp. 89-90). In its merger authorization reports, the Commission never made this jurisdictional finding. Instead, it contented itself with a general, conclusionary declaration that the various transactions "met with the requirements prescribed by § 5(2) and 20a and b of the act . . ." 331 I.C.C. 228 at 289 (App. to Jurisdictional Statement in companion appeal No. 899, p. 245 at 345). In its report of March 31, 1966 disapproving the merger, the Commission, as noted earlier (*supra*, p. 15), included in descriptive material about Railway a single sentence observation that Railway had acquired rights to Railroad's properties

by virtue of foreclosure proceedings in 1896. Such observation, however, is no more a finding on the title issue satisfying the statutory requirement than is the all encompassing "ultimate finding." See *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475 at 489, and cases cited therein, where this Court insists that the Commission make basic findings before exercising its authority.

The Administrative Procedure Act also imposed upon the Commission a statutory obligation regarding the contents of its decisions, providing that all decisions shall include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. § 557(c) (App. I, *infra*, p. 87). Thus, independent of the provision in the Interstate Commerce Act, there was an obligation upon the Commission to make a finding on the title issue, which is clearly a "material" issue, and to provide reasons therefor. The Commission had the same kind of obligation with respect to the issue of whether the statutory prohibitions in Railroad's federal charter against merger and mortgage are legal bars to the proposed merger. The Commission's reports had nothing to say about this issue. It was as though the issue had never been raised.

Apropos hereto is the question of the Commission's fulfillment of its obligation in connection with the conduct of the hearing itself. Pertinent parts of the Administrative Procedure Act provide that the hearing examiner's functions shall be performed "in an impartial manner" and that a party "is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence . . ." 5 U.S.C. § 556(b) and (d) (App. I, *infra*, pp. 86-87). The fact was that the hearing examiner prevented the Committee from developing its case and rebutting adverse testimony on the hearing record (*supra*, pp. 13-14) and the Commission upheld the examiner (*supra*, pp. 15-16). To the contrary, the issues raised by the Committee which the examiner permitted to be treated only in legal brief were of such character and importance that

the Commission itself should have pursued them independently instead of resisting and avoiding them. An administrative agency has a duty to investigate all relevant issues and to assure itself that sufficient evidence is adduced. *Isbrandtsen Co., Inc. v. United States et al.*, 96 F. Supp. 883, aff'd 342 U.S. 950.

The court below had the opportunity to correct the noted errors in the administrative proceeding, but it failed to do so and defaulted in the exercise of its supervisory powers over the Commission. Under that part of the Administrative Procedure Act pertaining to judicial review (5 U.S.C. § 706; App. I, *infra*, p. 88), the court below was required to decide all relevant questions of law and statutory provisions to the extent necessary to decision and when presented. Of the questions raised by the Committee in the administrative proceeding and to the court below and also raised in this appeal, the court below made reference in its opinion to only one, that is, the title question. And it held that the Commission was not required to go into the question (App. A, *infra*, pp. 31-32). The effect of the holding was to relieve the Commission of its statutory obligation of making a jurisdictional finding before exercising its merger authorization power; it left open a question which as a matter of public interest should be resolved prior to any merger approval. See *Schwabacher v. United States*, 334 U.S. 182, where this Court reversed and remanded a district court order affirming a rail merger authorization for the reason that the Commission left open a serious question in issue within its responsibility.

The error of the court below in not requiring the Commission to determine the title issue but permitting it to rely on inconclusive, controverted "existing judicial records" was compounded when the court chose to ignore the further issue of whether Railway and the Commission are bound by all of the obligations and restrictions in Railroad's federal charter, including the prohibitions against merger and mortgage without Congressional consent.

With respect to the disposition of the Committee's appeal by the court below, the observation by this Court in *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300 at 318, appears appropriate: "The deference owed to an expert tribunal cannot be allowed to slip into judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress."

CONCLUSION

For the foregoing reasons probable jurisdiction of this appeal should be noted and the case set down for full hearing on the merits.

Respectfully submitted,

VALENTINE B. DEALE
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorney for Livingston Anti-Merger Committee

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No.

LIVINGSTON ANTI-MERGER COMMITTEE,
Appellant

v.

INTERSTATE COMMERCE COMMISSION, et al.,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPENDIX TO JURISDICTIONAL STATEMENT FOR LIVINGSTON ANTI-MERGER COMMITTEE

TABLE OF CONTENTS

	Page
Appendix A (Excerpt from Opinion of District Court)	31
Appendix B (Excerpts from Hearing Examiner's Report)	33
Appendix C (Report of the Commission on Petitions for Rehearing, March 31, 1966)	42
Appendix D (Federal Charter of Northern Pacific Railroad Company, an Act of July 2, 1864)	60

Appendix E (Joint Resolution of May 31, 1870, authorizing Northern Pacific Railroad Company to issue bonds and to secure same by mortgage) 74

Appendix F (Proviso in an Act of July 1, 1898, regarding effect of foreclosure proceedings against Northern Pacific Railroad Company upon ownership of lands granted to it by the United States) 76

Appendix G (Act of June 25, 1929, providing for prosecution of suit by the Attorney General to remove cloud upon title to lands belonging to the United States as a result of claims by the Northern Pacific Railroad Company and the Northern Pacific Railway Company) 77

Appendix H (Excerpts from Act of March 3, 1871, incorporating the Texas Pacific Railroad Company; an Act of July 10, 1962, supplementing certain provisions of said Act of incorporation) 83

Appendix I (Excerpts from Administrative Procedure Act as revised and now codified) 86

Appendix J (Excerpts from Interstate Commerce Act) 89

Appendix K (House Resolution No. 168, 54th Congress, 1st Session) 91

APPENDIX A

Excerpt from Opinion of the United States District Court for the District of Columbia in the Northern Lines Merger Case, Civil Action No. 1132-68, Particularly Dealing with the Contentions of the Livingston Anti-Merger Committee (pp. 57-58)

Contentions of Livingston Anti-Merger Committee

The principal contention of the Committee seeks to raise for decision within the merger case a title case of great magnitude. The Committee contends that the history of the title to the properties now in Northern Pacific Railway Company, beginning with the Act of Congress of July 2, 1864 (13 Stat. 365) incorporating the "Northern Pacific Railroad Company," shows that the acquisition in 1896 of the properties by Northern Pacific Railway Company by foreclosure proceedings was invalid. This history is long in time and complicated in nature. After reviewing it with aid of the briefs we conclude the Commission did not err in refusing to disapprove the merger because of the Committee's challenge. In *United States v. Northern Pacific Ry. Co.*, 311 U.S. 317, 328, though the litigation involved other issues, the Supreme Court in 1940, in tracing the title of Northern Pacific, said:

> The corporation chartered by Congress [the Railroad Company] operated the road until receivers were appointed in 1893. Pursuant to foreclosure proceedings the Northern Pacific Railway Company [the applicant] acquired title to the railroad, the land grant, and all other property of the original corporation and has since operated the road and obtained patents for millions of acres under the land grants.

And see *Northern Pacific Ry. Co. v. Boyd*, 228 U.S. 482, 502, holding the foreclosure sale binding between the parties though not against the creditor Boyd; *Landell v.*

Northern Pacific Ry. Co., 122 F. Supp. 253 (D.D.C.), where it is held that laches barred the effort there to upset Northern Pacific's title, *aff'd*, 96 U.S. App. D.C. 24, 223 F.2d 316, *cert. denied*, 350 U.S. 844. And see the opinion of Attorney General Judson Harmon, 21 Op. Atty. Gen. 486 (1897), and that of Attorney General W. H. Moody, 25 Op. Atty. Gen. 401 (1905). Mr. Moody became an Associate Justice of the Supreme Court. The Commission was not required to re-litigate the issue or to withhold approval of the merger pending possible new litigation over Northern Pacific's title. For purposes of merger proceedings it could rely on the existing judicial records in that regard, suplemented by the opinions of two Attorneys General. Should these old problems engage the judiciary again in separate litigation placing Northern Pacific's title in issue, and any different result eventually be reached from that heretofore recorded, the effect on the merger in its then status would be for the judiciary to resolve in its decree in that litigation.

* * * * *

APPENDIX B

Excerpts from Report, Certificate and Order Recommended by Robert H. Murphy, Hearing Examiner, Served August 24, 1964, in the Northern Lines Merger Case, Interstate Commerce Commission's Finance Docket Nos. 21478, 21479 and 21480

In that part of the report where the corporate status, operations and properties of the applicants for merger authorization were the subject of exposition, the Hearing Examiner made the following statements about the Northern Pacific Railway Company (pp. 27, 30):

Northern Pacific, a Wisconsin corporation, was organized March 15, 1870, as the Superior and St. Croix Railroad Company. The name of the corporation was changed to its present name on July 10, 1896. On September 1, 1896, it acquired the railroad and land grant of Northern Pacific Railroad Company, a Federal corporation. . . .

* * * * *

In addition to its transportation properties and other investments, which include 100 percent stock ownership of Cuyuna Realty Company, Lemhi Telephone Company, and Missabe Realty Company, not engaged in transportation, Northern Pacific has large land holdings which are important sources of income to it. Most of the lands were part of the land grant made by the Act of Congress of July 2, 1864, incorporating the Northern Pacific Railroad Company and granting lands to induce construction of its railroad from a point on Lake Superior to Puget Sound by the northern route, so as to bring about settlement and development of that region, add value to the government lands therein and establish facilities for the transportation of mails, troops, munitions and public stores to and from the west coast. To aid in the construction 39,473,369 acres of alternate, odd-numbered sections of non-mineral public

lands were granted by the original grant together with a right of way of 200 feet on either side of the railroad where it passed through the public domain together with necessary lands for station buildings, shops and other appurtenances. The rights to them were acquired by Northern Pacific at foreclosure and sequestration sales following foreclosure in 1896 of mortgages placed on the railroad and land grant by the federal corporation.

In that part of the report concerned with the contentions of intervenors in the administrative proceeding, the Hearing Examiner stated the following with respect to the case of Livingston Anti-Merger Committee (pp. 361-366):

Intervener Livingston Anti-Merger Committee, a non-corporate non-profit association of individuals located in and about Livingston (population 7,683), Helena, and Glendive, Mont., organized in December 1960, opposed the unification and in particular the Northern Lines merger on numerous grounds, contending that (1) the Commission lacks jurisdiction to entertain application for or to approve and authorize the proposed transactions, particularly merger involving Northern Pacific for the reason that Congress has refused to enact legislation necessary to enable applicant Northern Pacific to succeed to Northern Pacific Railroad Company's charter, franchise, right-of-way and other statutory assets, (2) the Act does not supersede the terms and limitations on the Federal charter of the predecessor of Northern Pacific which prohibits the proposed consolidation and prohibits the proposed mortgage without the consent of Congress, (3) the Northern Lines merger should be denied because the studies and plan upon which the application is based are erroneous and contain false assump-

tions to the degree that it is impossible to properly evaluate the effect of merger, (4) faster freight service would be available only to eastern and western termini of the present Northern Pacific system and that nearly all intermediate points would get slower and poorer service, and (5) there is no true economic justification for the proposed transaction.

Its evidence through ten witnesses deals primarily with job loss and fear of economic impact. It includes that of two of its officers, one a conductor, the other a fireman, both employed by Northern Pacific, concerned with potential influence of an interlocking directorate of Northern Pacific, the impact of Livingston's economy with its 800 railroad employees receiving a bi-weekly payroll of $180,000, and that selection of Great Northern route for movement of transcontinental traffic would reduce service on the Northern Pacific line. Intervener disagrees with applicants' evidence on faster service and improved car supply, and aspects of the Wyer Report dealing with savings in diesel repair costs. Other evidence includes that of a proprietor of a Livingston pharmacy (also an officer of the chamber of commerce) concerned with Livingston's historically poor employment relations with Northern Pacific; a state representative of Park County (population 13,168), Mont., (also, a conductor-brakeman on Northern Pacific) concerned with Park County's unemployment rate, fear of job loss and effect of merger on tax structure (county property valuation $38,285,998 with Northern Pacific property valued at $5,244,308 for tax purposes), in that Northern Pacific is Livingston's principal industrial payroll; a Livingston realtor who fears reduction in employment at Livingston would result in prospects of high volume of residential properties for sale with few prospective purchasers; a floor covering proprietor, who sometimes uses Northern Pacific service, fears elimination of competition in rail service would result in settling any claims he might have against the railroad; a livestock operator, who occasionally uses Northern Pacific services fears merger would result in lack of rail competition and create a monopoly; a Living-

ston hardware store proprietor, who fears merger would result in monopoly and that prospects of increased unemployment would adversely affect his business; the Mayor of Livingston evidencing formal action by its city council in opposition to merger; and an attorney who made a study of the Northern Pacific at the request of a relative who is an officer of a committee of dissenting stockholders of the predecessor of Northern Pacific.

Its contention in (3) above deals with study X-L of the Wyer Report. Its argument that the study portrays savings in diesel repair costs not transposed into employee reduction figures at specific diesel maintenance points, and that the result is an inaccurate employee reduction figure, is not valid, and is discussed elsewhere herein dealing with analysis of the various studies of the Wyer Report. The subject matter, which is not limited to study X-L, runs across the various studies II, VI, VII, X and XVIII of the Wyer Report. The record reflects for Livingston, for which that intervener is concerned, a net of 46.6 jobs abolished and a net reduction in compensation of $497,753.

Its contention that the projected attrition rate is not applicable to future years because no consideration was given to the age group factor, is such that the significance of the argument baffles analysis. The record shows that the consultants took the actual attrition rate as it existed for three years and projected that into the future. No other data or method is suggested as appropriate for analysis of that phase of the subject.

Its contention that the per diem cost savings and faster freight service predicated by applicants cannot be achieved by shifting the traffic from the Northern Pacific line to the Great Northern line between Casselton and Sandpoint, is without consideration of the pertinent evidence. That evidence clearly demonstrates that the greatest savings in time result from speed up of terminal operations and that without unification it could not be accomplished. Livingston's contention in (4) above that faster freight service

would be available only at eastern and western termini and not to intermediate points ignores extensive evidence of record dealing in detail with service at intermediate points and previously discussed elsewhere herein.

Its contention in (5) above that there is no true economic justification for the proposed unification is predicated on the fact that Northern Pacific has been richly endowed through land grant and its non-operating revenues provide it with economic stability and that it is a financially healthy railroad. Suffice it to say, the financial condition of a carrier and its economic stability are pertinent matters for consideration by the Commission in proceedings of this nature. The economics of the proposal have been thoroughly explored and the substance discussed. The savings which would accrue to the New Company and the benefits of improved service are extensive and substantial. Its arguments are without merit.

Further, its challenge to the Commission's jurisdiction in (1) above, to authorize transfer of the Northern Pacific right-of-way and franchise to New Company, and to authorize mortgage of the Northern Pacific road by New Company in (2) above, to secure a bond issue whose proceeds are to be used for purposes other than the construction and equipment of that road, is that the prohibition against mortgaging without the consent of Congress is limited to a mortgage on the road and is not applicable to mortgaging of the public lands granted in aid of construction, citing Joint Resolution of May 31, 1870, (16 Stats. 370) in support of the proposition that the consent therein was limited to mortgage to secure bonds issued to aid construction and that such authority was exhausted prior to 1896. It argues further that Congress (a) refused to pass necessary legislation enabling Northern Pacific to succeed to the Federal corporation's road and franchise, (b) refused to recognize the legality of the consent decree[39] and reserved that

[39]Entered in *Farmer's Loan & Trust Co., et al. v. Northern Pacific Railroad Co. et al.* (no citation). and pertinent portions of the text

question for determination as a contested matter, citing Act of July 1, 1898 (30 Stats. 546, 620, 621),[40] (c) refused to dissolve the Federal corporation, (d) treated the Northern Pacific Railroad Company as having the title interest under the Act of 1864, citing Mt. Ranier National Park Act of March 2, 1899 (30 Stats. 933), wherein only mention is made of Northern Pacific Railroad Company, no mention being made of Northern Pacific, (e) recognized the "present title" of the Northern Pacific Railroad Company in the right-of-way and Northern Pacific's use thereof "in good faith" for "the operation of said road," citing Act of June 25, 1929, sec. 4,[41] (46 Stats. 41), and (f) continued the rights reserved to the United States under the Act of July 2, 1864, and reserved to the United States the right at any time to enact further legislation relating thereto, citing Act

---

set forth in Hearings of the Joint Congressional Committee for the Investigation of the Northern Pacific Land Grants, pursuant to Public Resolution No. 24, 68th Congress, approved June 5, 1924.

[40] Which provides, in part:

> ". . . that nothing herein contained shall be construed as intended or having the effect to recognize the Northern Pacific Railway Company as the lawful successor of the Northern Pacific Railroad Company in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company in the Courts of the United States, but the legal question whether the Northern Pacific Railway Company is such lawful successor of the Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provisions of this Act.

[41] Which provides:

> "The provisions of this Act shall not be construed as affecting the present title of the Northern Pacific Railroad Company or its successors, the Northern Pacific Railway Company, or any subsidiary of either or both, in the right of way of said road or lands actually used in good faith by the Northern Pacific Railway Company in the operation of said road."

of June 25, 1929, sec. 3.[42] Allegation of lack of power to authorize transfer of the Northern Pacific right-of-way is predicated on the claim that Northern Pacific does not own those properties because its purchase thereof at foreclosure sales under decrees of the court in 1896 was not authorized by Congress. Allegation of lack of power to authorize New Company's proposed mortgage is predicated upon the contention that no mortgage of the Northern Pacific's road can be made except as authorized by the Joint Resolution of May 31, 1870 (16 Stats. 378), authorizing the Northern Pacific Railroad Company to issue bonds for the construction of its road and to secure the same by mortgage, which authority was long ago exhausted, and also upon the contention that the new Delaware corporation cannot be lawfully authorized by the Commission to mortgage a road and franchise which Northern Pacific has no lawful right to transfer since they are the statutorily inalienable property of the Federal corporation.

Livingston's challenges to the Commission's jurisdiction should be dismissed as lacking in merit. The Act contemplates that authority granted by the Commission under section 5(2)(a) thereof to authorize "two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership" does not contemplate litigation before

---

[42]Which provides:

> "The rights reserved to the United States in the Act of July 2, 1864, to add to, alter, amend, or repeal said Act, and in the resolution of May 31, 1870, to alter or amend said resolution, are not to be considered as fully exercised, waived, or destroyed by this Act or the exercise of the authority conferred hereby; and the passage of this Act shall not be construed as in anywise evidencing the purpose of intention of Congress to depart from the policy of the United States expressed in the resolution of May 31, 1870, relative to the disposition of granted lands by said grantee, and the right is hereby reserved to the United States to, at any time, enact further legislation relating thereto."

the Commission of title to the properties or franchises claimed by and in the possession of the applicant carriers. Moreover, the execution of a mortgage of its railroad properties by a carrier does not constitute an issue of securities within the purview of section 20(a) of the Act, and accordingly does not require any determination by the Commission of the carrier's corporate power to execute the mortgage. Compare *Bond of Panhandle & S. F. Ry. Co.*, 150 I.C.C. 155; *Bond of Gulf, B. & K. C. Ry. Co.*, 150 I.C.C. 677; *Chicago & N. W. Ry. Co. Purchase Minneapolis & St. L. Ry. Co.*, 312 I.C.C. 285.

The grant of authority to the Federal corporation contained in the Joint Resolution of May 31, 1870, to mortgage its property and rights to property of all kinds included authority to transfer to any purchaser thereof, upon foreclosure of the mortgage, absolute title to the properties, unencumbered by any restriction on the power of the purchaser to sell or mortgage those properties. Since a corporation obtains its powers from the same source as does its existence, the powers of any corporate purchaser of those properties to sell or mortgage them would, necessarily, depend upon the laws of the state of its incorporation and not on anything contained in the charter of the Federal corporation.

Northern Pacific has all necessary powers under its Wisconsin charter and the laws of the State of Wisconsin to mortgage its railroad and properties to secure its bonds issued for any proper corporate purpose, without requiring the consent of Congress. It placed two mortgages on its property without such consent in 1896, when it acquired those properties, and in 1914 it executed its refunding and improvement mortgage thereon and issued and sold bonds thereunder, and again in 1921 issued and sold additional bonds under that mortgage, with the approval and authorization of this Commission, not to aid in the construction and equipment of its road but to refund its share of joint Greater Northern-Northern Pacific bonds issued to purchase

stock control of Burlington. Its power to make those mortgages has not before been questioned.

Northern Pacific contends that it has at all times recognized that upon itself rests all obligations imposed on the original company by the Act of July 2, 1864, which were designed to secure to the government at all times (but particularly in time of war) the use and benefit of the railroad for postal, military, and other purposes. This has not been disputed.

Livingston's arguments in respect of Northern Pacific's ownership of the railroad and properties which it proposes to merge into New Company or of its freedom from the mortgage restrictions to which its predecessor, Northern Pacific Railroad Company, was subject under the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, are without merit."

* * * * *

APPENDIX C

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 21478[1]

GREAT NORTHERN PACIFIC & BURLINGTON LINES, INC.–MERGER, ETC.–GREAT NORTHERN RAILWAY COMPANY, ET AL.

Decided March 31, 1966

Upon consideration of the record, and of petitions (embraced in exceptions to the report and recommended order of the hearing examiner) of the Department of Justice, the State of Minnesota Railroad and Warehouse Commission, the Public Utilities Commissioner of Oregon, and the State of Washington, for rehearing, found that a full and fair hearing was afforded parties to the proceedings. Petitions denied.

Appearances as shown in companion report.

Report of the Commission on Petitions for Rehearing

Walrath, *Commissioner:*

By report and order served concurrently herewith, the merits of these proceedings are being considered. Directly related thereto are preliminary matters raised by the Department of Justice (Department), State of Minnesota Railroad and Warehouse Commission (Minnesota), the State of Washington (Washington), and the Public Utility Commissioner of Oregon (Oregon), that they have been deprived of a full and fair hearing to which they are entitled. The

[1] Embraces Finance Docket No. 21479, Chicago, Burlington & Quincy Railroad Company, et al.–Stock Issuance, etc., and Finance Docket No. 21480, Great Northern Pacific and Burlington Lines, Inc., et al.–Construction and Abandonment.

first three allege the examiner was biased and prejudiced against interveners who oppose the application in whole or in part (hereinafter "the opponents"), and that bias was displayed frequently in his conduct of the hearings, and in statements in his report. They, with Oregon, therefore urge the applications either be denied, or the matter be heard *de novo.*[2] These allegations, raised on brief and on exceptions shall, for convenience in this report, be treated as petitions for rehearing. The significance of these allegations is readily apparent because, if substantiated, they would seriously compromise the entire proceeding.

"Bias" is defined[3] as a propensity, or prepossession of a view not leaving the mind indifferent; and "prejudice" as preconceived judgment or opinion. Both definitions relate to a state of mind or mental attitude, and as such are difficult of ascertainment, and still more difficult to establish by proof. Inevitably, errors of judgment may occur in any case but especially in long and vigorously contested proceedings, and parties presenting more controversial questions requiring bench rulings will in the long run encounter more subject to question than those whose case does not call for so many such decisions. Errors of this nature seldom constitute bias.

To clarify consideration of the question raised by the pleadings, a chronological recitation of certain events which

---

[2]To a limited extent, later explained, counsel representing Livingston Anti-Merger Committee (Anti-Merger Committee), charged the examiner on brief with possible "prejudgment." And in its exceptions, the State of Montana urges that it was denied fair participation in the hearings because of limited time to prepare for cross-examination of certain witnesses. Montana timely brought this matter to the attention of the Commission, but Division 3, acting as an Appellate Division denied any extention of time. Although Montana failed to preserve this question by not raising it on brief, we nonetheless have considered it, and think the preparation time for cross-examination was adequate and find no basis for rehearing on that ground.

[3]Webster's New International Dictionary, unabridged, 2nd edition.

occurred before and during the hearing will be helpful. On September 1, 1961, Minnesota filed a petition asking dismissal of the application, or in the alternative a postponement of the first hearing, then scheduled for September 19, 1961, to May 1, 1962, or later. On September 5, Montana filed a similar petition asking for postponement and also requesting the hearings be held "before a joint board of examiners composed of representatives from the regulatory bodies of the States affected by the application, and of a like number of members or representatives from the Interstate Commerce Commission." By order dated September 8, 1961, division 3 denied both of these petitions, except to the extent that the initial hearing was postponed to October 10, 1961.

On September 25, Minnesota requested reconsideration of the order of September 8. Again it requested that the first hearing be held not sooner than May 1, 1962, and in this petition urged that a joint board composed of representatives of several of the States involved conduct the hearings, or as an alternative, that such a board sit with the Interstate Commerce Commission. By order of division 3 dated October 5, 1961, the petition of Minnesota for reconsideration was denied. That order said in part * * * "assignment of hearing in these proceedings before a joint or cooperative board does not appear desirable and in the interest of orderly and expeditious procedure * * *."

On June 15, 1962,[4] Chairman Paul A. Rasmussen of the Railroad and Warehouse Commission of Minnesota appeared before a subcommittee of the United States Senate, which had under consideration legislation in respect of railroad mergers. (Hearings, 87th Congress, 2d Session, pursuant to S. Res. 258 on S. 3097.) Mr. Rasmussen stated he had attended and observed, but not participated in, the hearings in this proceeding, including the session in Seattle, Wash.

---

[4]By this date, page 13032 of the transcript had been reached. Hearings closed on July 10, 1962, at page 15004 of the transcript.

He said, at page 241 of the subcommittee report of the hearing:

> While in Seattle, I called a meeting in one of the hotels on Tuesday evening, April 3, in an effort to coordinate the activities of the eight States involved as protestants. There were commissioners from six States represented at this meeting, together with their attorneys and staff members, and it was the concensus of all present that the examiner was so prejudiced and biased that we discussed whether or not this fact should be definitely placed in the record at that time or if it should be discussed and considered at the time that briefs were filed. It was decided to wait because if it were called to this (sic) attention at that time, it might result in causing him to change his tactics and techniques. The proceeding has progressed so far now that there is no way in which this examiner can rectify what he has already done in this proceeding.

At the time this meeting in Seattle was held, the transcript had reached page 6392. Also before the subcommittee, Mr. Rasmussen charged that the examiner had conducted hearings in this case in an "unorthodox, arbitrary, and biased manner," thus confirming his "apprehension in connection with delegating such an important responsibility to one examiner." He said further that he had pleaded with the Department of Justice to participate in this case, and that the Department had "entered the proceeding in Seattle," just a few days before the April 3 hotel meeting above mentioned.[5]

Although Mr. Rasmussen stated that he, as well as certain parties to the proceeding were, as of the April 3 meeting, of the view that the examiner was biased and prejudiced, these matters were not called to our attention until long after the close of the hearings. No party has moved the

---

[5]The Department first appeared on the 29th day of hearing, March 19, 1962.

disqualification of the hearing officer nor have affidavits of personal bias concerning the examiner's conduct of the hearings ever been filed, notwithstanding the provisions of section 7(a) of the Administrative Procedure Act that such shall be the manner in which the alleged disqualification of the examiner shall be brought to the attention of the Commission. And yet, despite the obvious tardiness of the parties in calling this matter to our attention, we nonetheless will comprehensively search for the facts.

Turning next to the pleadings, we consider first the position of the Anti-Merger Committee. This intervener takes no position on brief suggesting the examiner displayed bias against it. Its statement on brief that "the ruling indicates possible prejudgment by the examiner of the jurisdictional issue" is advanced merely as a ground that the examiner was in error in declining to receive exhibit 210 in evidence. That document was the prepared statement of Witness Lishman, who is an attorney. Upon objection the examiner declined to receive it in evidence on the ground that it was a legal argument which should be submitted on brief.

The Anti-Merger Committee argues that exhibit 210 should have been received to contradict earlier testimony of applicants' Witness Macfarlane on the same general subject. Following the suggestion of the examiner, the Committee submitted on brief substantially all of the data tendered in exhibit 210. The examiner discussed this subject at length in his report.[6]

In its exceptions the Anti-Merger Committee makes several criticisms of the examiner, and therein uses for the first time the words "bias" and "biased". These charges are clearly addressed to the examiner's report, rather than to

[6]Nevertheless, the Department as later shown, undertakes to prove unfair and different treatment in the rejection of exhibit 210 by the examiner, as compared with the receipt in evidence of certain testimony of Witness Macfarlane for applicants, even though the Committee never contended Macfarlane's testimony should not have been received.

his conduct of the hearing. It must be borne in mind that the examiner's view is advisory only. The Commission itself ultimately and independently makes its findings based on the record, not on the report of the examiner. This challenge of bias in the report itself will not make out a case for rehearing, where as here, the record is complete.

Considering next the allegations of the Department, it does not use the word "bias" as attaching to the action or attitude of the examiner until it filed exceptions, but its allegation on brief concerning the actions of the examiner which supposedly deprived the opponents of a fair hearing amounted to charges of bias and prejudice. The brief of the Department is extraordinary. It makes charges of unfair treatment by the examiner of counsel for other opponents, or of witnesses placed on the stand by the latter, when the counsel directly concerned have made no similar charge.[7] No explanation is offered for this assumption of the burden of others, nor is it apparent why those counsel more immediately concerned were unable to perceive the purported errors alleged by the Department. The Department's brief contains 69 references to the record[8] (some repeated for different purposes) in connection with assignments of procedural errors to the examiner at the hearing.

Minnesota advances 7 grounds to support its claim that it was denied fair hearing. Two relate to the initial denial by the examiner of permission to opponents to cross-

---

[7]We have already mentioned such a situation with respect to Witness Lishman. Another concerns Witness Williams of the Spokane Anti-Merger Association. He was examined on the stand by his own counsel, and was questioned at length by the examiner. After failing to raise any question of fair hearing on brief, this intervener complained on exceptions about the examiner's conduct, and urged that it had not received a fair hearing. The Department, however, complained strongly, on brief, about the questioning of this witness.

[8]Not including 3 erroneous and misplaced references with respect to the application of rule 1.82 of our Rules of Practice.

examine Milwaukee Railroad witnesses and witnesses for the Northern Pacific Stockholders' Protective Committee. The examiner promptly reversed his initial rulings in both instances, and full cross-examination was had. These points have no status as bearing upon a fair hearing, as the final rulings favorable to the complaining counsel rectified completely the alleged errors. Another contention is that the examiner erroneously permitted applicants to introduce direct evidence concerning motor truck subsidiaries after the direct case for applicants had been completed.[9]

Washington complains that insufficient time was allowed to prepare for the initial cross-examination of applicants' first witnesses; and for review of the rebuttal evidence of applicants by its counsel. Rejection of certain evidence of Washington witness Burns in the form of answers to a questionnaire is assigned as error, and as different treatment of this intervener than that accorded applicants. Additionally, it complains of erroneous acceptance of certain rebuttal evidence and improper interference by the examiner.

The contentions of Oregon that it has not received full and fair hearing do not relate to the actions of the examiner, except as to his participation in the assignments of time for preparation of the case by the opponents. A second error assigned in respect of failure to provide full hearing is that such hearing required assignment by this Commission of members of its staff for full participation in the hearings. This second point is clearly without merit. *Broth. of Maint. of Way Employees v. United States*, 221

---

[9]The last can be disposed of readily. Cross-examination of the first and principal witnesses for applicants was commenced for convenience and expedition of the proceeding before applicants had completed their direct testimony. These procedures set up by the examiner were entirely reasonable. A statement by one of the counsel for applicants on the record would indicate that all of its testimony had been presented earlier, but counsel for Minnesota is mistaken in concluding that applicants had no right to present further evidence in chief after the first hearing.

F. Supp. 19 (1963), affirmed *per curiam*, 375 U.S. 216 (1963), sustaining *Chesapeake & O. Ry. Co.–Control–Baltimore & O. R. Co.*, 317 I.C.C. 261 (1962).

The above-mentioned allegations of error will be discussed under headings descriptive of the grounds advanced by the several interveners, followed by the names in parentheses of the interveners relying on such allegations.

Acceptance, over objection, of cumulative testimony (Department, Minnesota).—The admission of cumulative evidence normally is not considered fatal error in the conduct of a hearing. However, such an objection might assume importance if it were established that one side had been treated in a manner substantially different from the other in the admission of cumulative evidence. Here, however, except for general statements that such was the case, neither the Department nor Minnesota cites any example of different treatment in this area, as between the applicants' witnesses and those for the opponents. Moreover, in open discussion of record, the examiner spelled out what he considered to be cumulative evidence and what he did not so consider, first for counsel for Minnesota (Tr. 9409-9410)[10] and then for counsel for the Department (Tr. 11407-11415); and the latter, by request of the examiner, gave his differing concept (Tr. 11411). The examiner followed his stated policies in making all rulings called to our attention. The two counsel continued to object on the basis of their own views, and undertook to cross-examine the witnesses completely whenever their objections were overruled.

Such open and direct dealings on the record in the matter of cumulative evidence could hardly conceal some hidden bias of the examiner. If the stated policy of the examiner had been erroneous to a damaging degree, any party had the right to make, and should have made, immediate appeal to the Commission. No appeal was taken.

---

[10]References relate to pages in the transcript of testimony.

Out of a total of 101 assignments of error[11] in the Department and Minnesota briefs, the 56 which were directed to the matter of cumulative evidence find no support in the record to indicate bias or discrimination on the part of the examiner. Moreover, the objections of these two parties fail to reveal how the examiner's admission of what they deemed to be cumulative testimony prejudiced them.

Acceptance of improper rebuttal evidence (Department, Minnesota, Washington).—A trial officer may exercise wide discretion in the admission of rebuttal evidence. *Goldsby v. United States*, 160 U.S. 70, 74 (1895); and *Diehl v. United States*, 98 F.2d 545, 548 (1938). In this light, the area of inquiry is narrowed to whether that discretion was abused.

Interestingly, the counsel for these interveners, after objecting to admission of all of the rebuttal evidence, reserved time for later cross-examination of the witnesses on such testimony. However, they failed to appear[12] at the hearing scheduled for such cross-examination.

Counsel urging these objections did not request any opportunity to submit surrebuttal testimony, nor do they now maintain that any evidence submitted by applicants on rebuttal either took them by surprise, or related to entirely new matter. Their statement that certain "opponents requested that they be allowed to meet this additional evidence" could refer only to such a request from two intervening railroads which had requested that conditions be attached to any authorization of a merger. Although that

[11]Not including those already disposed of, or those relating to granting sufficient time to the opponents for preparation.

[12]It appears that the portion of the rebuttal testimony in which these three counsel had indicated direct interest was confined to matters of car supply. Other rebuttal testimony was directed to the evidence offered by a minority group of Northern Pacific stockholders, and certain conditions proposed by the Milwaukee Railroad and the Chicago and Northwestern.

request for surrebuttal was denied, the rebuttal evidence anticipated by these two railroads from the applicants never materialized.

As the record now stands, no request for further opportunity to meet evidence actually introduced in rebuttal by applicants was denied. Acceptance by the examiner of the rebuttal evidence is not shown to have been an abuse of his discretion.

Alleged erroneous and inconsistent rulings on hearsay testimony (Department, Washington). On brief, interveners misstate the rulings of the examiner in their charge that he operated under a "double standard" favorable to applicants. Both state that "over objections" Governor Erbe of Iowa was permitted to testify for applicants as to the contents of 48 letters and telegrams. But no objection[13] whatever was made to his oral testimony. In hearings before Federal administrative agencies, if hearsay evidence is admitted without objection it is to be considered and accorded its natural probative effect. *Opp Cotton Mills v. Administrator*, 312 U.S. 126 (1941), at page 155, and cases there cited; and *Rowland v. St. Louis & S. F. R. Co.*, 244 U.S. 106 (1917), at page 180.

Furthermore, in his report, page 17, the examiner concluded to decline to accept and consider the testimony of Governor Erbe because the authors of the communications in question were not present for cross-examination. Counsel for Washington nonetheless still insists on exceptions that this error "cannot be erased from the mind of the examiner." Counsel, however, are advised that the weight, if any, to be accorded that evidence, and for that matter all the evidence of record, is now before us for determination, not before the examiner.

---

[13]The only objection made in connection with Governor Erbe's testimony was *sustained* by the examiner; namely, an objection by the opponents against receiving in evidence said letters and telegrams themselves.

More important, in the case of the three witnesses alleged to have been the subject of a "different treatment" under the hearsay rule (Witnesses Getting, Szarkowski and Burns), seasonable objection was made in each instance by opposing counsel, and each was sustained. Thus we find no "double standard" in these rulings of the examiner.

Both interveners also argue that exhibits 179 and 180 of Witness Burns should have been received by the examiner under a recognized exception to the hearsay rule. As a rate expert of the Washington Utilities and Transportation Commission, he had prepared and mailed to 196 shippers a questionnaire concerning this proposed merger. Of the 72 shippers responding, 51 replies were said to be usable. Exhibit 179 was an explanation of the procedures of the witness, and exhibit 180 contained answers to the questionnaire. It may be noted that 13 of the firms which filed such replies had already given oral testimony herein through authorized witnesses. There is precedent for acceptance in our proceedings of exhibits based on returns to questionnaires prepared and explained by an expert. *West Coast Trans-Oceanic S.S. Line Com. Car. Application*, 285 I.C.C. 381, 383 (1953); *Paper Wrappers from St. Louis, Mo. to Louisville, Ky.*, 63 M.C.C. 422, 424 (1954); *United States v. National Homes Corporation*, 196 F. Supp. 370 (1961). Nonetheless the weight of authority requires that upon proper objection, exhibits based on returns to questionnaires be not admitted in evidence, because of the resulting lack of opportunity to cross-examine the parties furnishing the answers. *Somerset Bus Co., Inc., Extension–Somerville –New York*, 43 M.C.C. 543, 547 (1944); *Regulations for Payment of Rates and Charges*, 310 I.C.C. 391, 392 (1960); *Washington, D.C. Commercial Zone*, 83 M.C.C. 471, 473 (1960); *Oregon-Nev.-Calif. Fast Freight Inc., Ext.–San Jose*, 71 M.C.C. 165, 170 (1957); *Public Service Interstate Transp. Co.–Bergen Turnpike*, 43 M.C.C. 599, 607 (1944). Here again, we find no basis to the charge of unequal treatment favorable to applicants.

Alleged "double standard" as to receiving legal argument in evidence (Department). We have heretofore described the situation as to rejection of a statement of Witness Lishman. The Department, but not counsel for Witness Lishman maintains there was discriminatory treatment between the parties because the examiner earlier received in evidence a statement of Witness Macfarlane on substantially the same subject as Witness Lishman's proffered testimony. The complete answer to this contention is that there was no objection to this redirect testimony of Witness Macfarlane, which related to matters first raised on cross-examination. It therefore, for reasons shown above, is to be given its natural probative effect. In contrast, there was objection to the Lishman proffer of his statement, and the examiner properly sustained that objection.

Alleged failure to apply rule 1.82 of the Rules of Practice (Department). In his rebuttal testimony, in order to support an opinion expressed earlier, Witness Wyer submitted the results of a train control study he had made in another merger proceeding. When counsel for the Department discovered, upon inquiry, that the study had been submitted in evidence in another proceeding, he objected thereto because it had not been submitted as required by rule 1.82 of our General Rules of Practice. The examiner overruled the objection. We agree with his ruling. Rule 1.82 has no application to the testimony of a witness who again testifies from his own knowledge and is ready to stand cross-examination on such testimony.

Alleged unreasonable restriction on opposition counsels' cross-examination (Minnesota, Washington, Department).— A total of 19 instances of this error by the Examiner is alleged. Two are on behalf of counsel for other opponents who did not themselves choose to allege error on this ground. In 12 instances the examiner ruled upon an objection from opposing counsel, and in 7 instances the examiner himself intervened, usually to inquire whether the record supported the underlying basis for the question

asked by counsel. In only four instances does it appear that the examiner was instrumental in causing counsel for the opponents to end their cross-examination. These were as follows:

> (1) Counsel for an opponent (not here complaining) was requested by the examiner to confine himself to one more illustration of delay in trains, with the comment that this counsel had been given a half hour more time to question than the others, and that it was then almost 6 p.m.
>
> (2) After asking questions on cross-examination covering nine pages of transcript, counsel for an opponent asked a question as to which the examiner sustained an objection. Counsel: "I certainly take exception to the ruling. That is all; no more questions."
>
> (3) After seven pages of his cross-examination, the examiner sustained an objection to a question of counsel for an opponent on the ground that it contained "mischaracterization of the record." Counsel thereupon stated that he would "just stop cross-examination on that score."
>
> (4) After counsel for an opponent had asked questions covering 35 pages of the transcript, he stated during a discussion that he did not believe that his client was being fairly treated by the examiner. Examiner: "I said that line is exhausted." Counsel: "You have exhausted me, too. That is all I have."

We have examined each of the instances cited under this heading by counsel, and find no prejudicial treatment of the opponents by the examiner. The examiner is authorized and required by rule 1.70 of our rules to regulate[14] the course of the hearing. In so doing he not only has the right, but the duty of clarifying the record by means of interrogating witnesses and counsel as required. Indeed,

---

[14]See also section 7(b) of the Administrative Procedure Act.

where the issue is consistency with the public interest, as here, the examiner has a separate duty to the public that the facts be clearly and completely presented to the Commission for decision.

Examiner questioning witness Williams on and off the record (Department). This witness, a full-time employee of the Northern Pacific Railroad, testified as the president of the Spokane Anti-Merger Association. In addition to witness Williams, the position of his Association was supported by the testimony of another member of the Association and of six other witnesses. Also, it was stipulated that 14 additional witnesses who were present would, if questioned, respond substantially as those who had testified.

Going off the record, the examiner further questioned witness Williams, and we accept as reasonably accurate the following statement of what transpired, from page 198 of the Department brief:

> While "off the record" at his direction the examiner continued in the above vein his vigorous and heated cross-examination of the witness seeking unsuccessfully to make him admit that the only interest which his organization had was to preserve railroad jobs now existing. The court reporter at the direction of the examiner took down none of the "off the record" questioning by the examiner or his remarks relating thereto.

The Department incorporated in its brief two newspaper articles discussing the hearing, and the situation in respect of witness Williams in particular. Affidavits from counsel for the Department, for Minnesota, and for Washington that said newspaper articles were accurate statements of the events which occurred were also included. Examination of these newspaper items shows that they report happenings both on and off the record without distinction. While they do not provide any pertinent details of substance which are not already of record, they do nonetheless plainly underscore the "verbal clash" between the examiner and counsel.

Counsel for the Department offered at the hearing a motion, joined by counsel for Minnesota and Washington, that the examiner's questions and remarks off the record in connection with witness Williams be made a part of the record, together with a notation that these interveners had objected to the entire procedure. The examiner declined to act upon this motion. This is assigned as substantial error by the Department. This action of the examiner could not constitute prejudicial error, as we have found that the record adequately reflects the position of the Association.

The examination of witness Williams by the examiner was unnecessarily prolonged and unduly "heated", to use the word of counsel. It amounted to an attempt to break down the stated position of the witness on the record. We do not condone the actions of the examiner in the prolonged questioning on and off the record of this witness. Nevertheless, the evidence sought to be adduced by such questioning pales in importance as compared with the record as a whole. On balance, we conclude that the examiner's treatment of this witness, albeit harsh, does not establish bias or prejudice on the part of the examiner against the opponents.

Affidavits tendered by Department in exceptions.—These exceptions contain two affidavits "executed at the request of the Department of Justice" on November 5, 1964. The affiants report purported separate conversations held by them with the examiner after the close of a session of the hearing held at St. Paul on January 23, 1962.

In speaking with the examiner, affiant Curran, an official of a rail brotherhood of the Great Northern Railroad, advised him that the Spokane Anti-Merger Association would have 33 witnesses to testify at Spokane. When the examiner was told of the identity and proposed testimony of the Spokane witnesses, affiant states the examiner expressed the view that so-called public witnesses could not contradict applicants' witnesses who were authorities in the

transportation field, because of lack of knowledge of transportation by the former; that these railroads should merge to avoid the financial difficulties which New England railroads had already encountered; that he did not propose to listen to large quantities of repetitive testimony from public witnesses; that truck lines had benefited from past mergers; and finally, that in five or six different ways and in extravagant terms, the examiner stated his belief that witnesses for applicants were so well qualified that their views should be respected by everyone.

The statement of affiant Levin corroborates the above conversation to the extent that the examiner was heard to question the value of the time to be consumed to hear 30 public witnesses, and comment on the lack of ability of such witnesses to disprove evidence of expert witnesses for applicants.

The affiants are officials of separate brotherhoods of railroad employees. Each testified in this case some 5 months after the conversations in question occurred. Both strongly oppose the entire merger plan because they believe it will result in loss of employment and other inconveniences to their members.

As noted, the affidavits first came to light in the exceptions of the Department. They refer to conversations of nearly 3 years earlier, and they are submitted by the Department, not by the party on whose behalf the witnesses appeared. Delay in bringing this material to our attention is explained by the Department: "The conversations recounted in the affidavits came to our attention only following issuance of the examiner's report and while our exceptions were under preparation." (See Department's Exceptions, page 7.) At oral argument counsel for the labor interests stated that the first he knew of the contents of the affidavits was when he read the exceptions of the Department. Curiously then, labor counsel's own witnesses never brought these conversations to his attention, even

though these same witnesses later testified on the record under the auspices of this counsel.

In our consideration of this matter, we have, despite the odd circumstances surrounding its presentation, viewed it in a light most favorable to the opponents, for we have assumed the affidavits to be accurate. Seen from that point though, the affidavits do not disclose a prejudicial bias as to require disqualification of the examiner. Coming, as they did, at a time when only applicants had submitted their case, his comments would not indicate that the examiner had so inevitably made up his mind to approve the proposed transactions that he could not be persuaded otherwise by evidence of those opposing the merger.

Admittedly, extra-record conversations of this nature are ill-advised. But we do not believe the examiner prejudged the case. It is unnecessary, therefore, to conduct any further proceedings to determine whether the alleged off-the-record remarks were made, for the parties were afforded a full and fair hearing and suffered no prejudicial error.

Conclusions

The right to a fair hearing is fundamental to the decisional process. That right comprehends that each of the parties shall be accorded reasonable opportunity to present its case fully and completely. With these precepts in mind, we have made a searching examination of the record to determine whether there was any substance to the charges leveled against the examiner. As our report herein plainly shows, we are convinced, beyond doubt, that the conduct of our examiner and the record developed satisfy the requirements of fairness and impartiality towards all the litigants. Indeed, we deplore the lack of appreciation shown by critics of the examiner for his demanding assignment in this bitterly contested and protracted proceeding.

Our view that the conduct of the hearings was fair is shared by diverse parties. For instance, the labor intervener in opposition indicated at oral argument that any inade-

quacies in the record were applicants', not the examiner's. Counsel felt there was adequate information, apart from the impact on other railroads, for us to make a decision. The Milwaukee, a party with a tremendous stake in the applications, at oral argument stated unqualifiedly that it received a fair hearing, with ample time to prepare and present its case. Even Minnesota, a party loud and clear in its criticism of the examiner, indicated at oral argument that it could live "* * * with the treatment through the case * * *" although not with the report.

We are told the examiner's partiality is betrayed by the report itself. We find no support for the charges. True, the findings in the report are generally adverse to the opponents. But the report of the facts and the recommendation of the hearing examiner have been the subject of exceptions and criticized on oral argument. These, we, the Commission, must now weigh. The examiner's responsibility has terminated; the final decision is ours.

On the question of whether there was a fair hearing, the opponents have searched the record and called our attention to every act or omission of the examiner which they believed would indicate bias or prejudice on his part. We have analyzed closely each of their assignments of error. In so doing, we have weighed their cumulative, as well as their individual, effect. From this analysis we conclude that the charges of personal bias and prejudice against the examiner, and other allegations of denial of a fair hearing in these proceedings, are baseless and reckless. The request for rehearing will be denied.

Findings

We find that a full and fair hearing wholly within the requirements of fundamental law was accorded all parties, that the allegations of bias and prejudice are lacking in merit, and that the requests for rehearing should be denied.

An appropriate order will be entered.

APPENDIX D

An Act Granting Lands To Aid in the Construction of a Railroad and Telegraph Line from Lake Superior to Puget's Sound, on the Pacific Coast, by the Northern Route [approved July 2, 1864, 13 Stat. 365].*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Richard D. Rice, John A. Poore, Samuel P. Strickland, Samuel C. Fessenden, Charles P. Kimball, Augustine Haines, Edwin R. W. Wiggin, Anson P. Morrill, Samuel J. Anderson, of Maine; Willard Sears, I. S. Withington, Josiah Perham, James M. Becket, A. W. Banfield, Abiel Abbott, John Newell, Austin L. Rogers, Nathaniel Greene, jnr., Oliver Frost, John A. Bass, John O. Bresbrey, George Shiverick, Edward Tyler, Filander J. Forristall, Ivory H. Pope, of Massachusetts; George Opdyke, Fairley Holmes, John Huggins, Philander Reed, George Briggs, Chauncy Vibbard, John C. Fremont, of New York; Ephraim Marsh, John P. Jackson, jr., of New Jersey; S. M. Felton, John Toy, O. J. Dickey, B. F. Archer, G. W. Cass, J. Edgar Thompson, John A. Green, of Pennsylvania; T. M. Allyn, Moses W. Wilson, Horace Whittaker, Ira Bliss, of Connecticut; Joseph A. Gilmore, Onslow Stearns, E. P. Emerson, Frederick Smyth, William E. Chandler, of New Hampshire; Cyrus Aldrich, H. M. Rice, John McKusick, H. C. Waite, Stephen Miller, of Minnesota; E. A. Chapin, John Gregory Smith, George Merrill, of Vermont; James Y. Smith, William S. Slater, Isaac H. Southwick, Earl P. Mason, of Rhode Island; Seth Fuller, William Kellogg, U. S. Grant, William B. Ogden, William G. Greene, Leonard Sweat, Henry W. Blodgett, Porter Sheldon, of Illinois; J. M. Winchell, Elsworth Cheesebrough, James S. Emery, of Kansas; Richard F. Perkins,

---

*Provisions particularly pertinent to this appeal appear in bold face type.

Richard Chenery, Samuel Brannan, George Rowland, Henry Platt, of California; William F. Mercer, James W. Brownley, of Virginia; John H. B. Latrobe, W. Prescott Smith, of Maryland; Greenbury Slack, A. J. Boreman, of West Virginia; Thomas E. Bramlette, Frank Shorin, of Kentucky; John Brough, John A. Bingham, Oran Follett, John Gardner, S. S. L'Hommedieu, Harrison G. Blake, Philo Chamberlin, of Ohio; John A. Duncan, Samuel M. Harrington, of Delaware; Thomas A. Morris, Jesse L. Williams, of Indiana; Samuel L. Case, Henry L. Hall, David H. Jerome, Thomas D. Gilbert, C. A. Trowbridge, of Michigan; Edward H. Broadhead, Alexander Mitchell, Benjamin Ferguson, Levi Sterling, —— Marshal, of Wisconsin; J. C. Ainsworth, Orlando Humason, H. W. Corbett, Henry Failling, of Oregon; J. B. S. Todd, M. K. Armstrong, J. Shaw Gregory, J. Le Berge, of Dakota Territory; John Mullan, Anson G. Henry, S. D. Smith, Charles Terry, of Washington Territory; H. W. Starr, Platt Smith, Nixon Denton, William Leighton, B. F. Allen, Reuben Noble, John L. Davies, of Iowa; Willard P. Hall, George R. Smith, H. Gayle King, John C. Sargeant, of Missouri; William H. Wallace, of Idaho Territory; J. H. Lathrop, Henry D. Cooke, H. E. Merrick, of the District of Columbia, **and all such other persons who shall or may be associated with them, and their successors, are hereby created and erected into a body corporate and politic, in deed and in law, by the name, style, and title of the "Northern Pacific Railroad Company," and by that name shall have perpetual succession,** and shall be able to sue and to be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States, and may make and have a common seal. **And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin; thence westerly** by the most eligible railroad route, as shall be determined by said com-

pany, within the territory of the United States, on a line north of the forty-fifth degree of latitude **to some point on Puget's Sound**, with a branch, via the valley of the Columbia River, to a point at or near Portland, in the State of Oregon, leaving the main trunk-line at the most suitable place, not more than three hundred miles from its western terminus; **and is hereby vested with all the powers, privileges, and immunities necessary to carry into effect the purposes of this act as herein set forth**. The capital stock of said company shall consist of one million shares of one hundred dollars each, which shall in all respects be deemed personal property, and shall be transferable in such manner as the by-laws of said corporation shall provide. The persons hereinbefore named are hereby appointed commissioners, and shall be called the board of commissioners of the "Northern Pacific Railroad Company," and fifteen shall constitu[t]e a quorum for the transaction of business. The first meeting of said board of commissioners shall be held at the Melod/on hall, in the city of Boston, at such time as any five commissioners herein named from Massachusetts shall appoint, not more than three months after the passage of this act, notice of which shall be given by them to the other commissioners by publishing said notice in at least one daily newspaper in the cities of Boston, New York, Philadelphia, Cincinnati, Milwaukee, and Chicago, once a week at least four weeks previous to the day of meeting. Said board shall organize by the choice from its number of a president, vice-president, secretary, and treasurer, and they shall require from said treasurer such bonds as may be deemed proper, and may from time to time increase the amount thereof as they may deem proper. The secretary shall be sworn to the faithful performance of his duties, and such oath shall be entered upon the records of the company, signed by him, and the oath verified thereon. The president and secretary of said board shall in like manner call all other meetings, naming the time and place thereof. It shall be the duty of said board of commissioners to open books, or cause books to be opened, at

such times, and in such principal cities or other places in the United States, as they, or a quorum of them, shall determine, within six months after the passage of this act, to receive subscriptions to the capital stock of said corporation, and a cash payment of ten per centum on all subscriptions, and to receipt therefor. So soon as twenty thousand shares shall in good faith be subscribed for, and ten dollars per share actually paid into the treasury of the company, the said president and secretary of said board of commissioners shall appoint a time and place for the first meeting of the subscribers to the stock of said company, and shall give notice thereof in at least one newspaper in each state in which subscription books have been opened, at least fifteen days previous to *to* the day of meeting, and such subscribers as shall attend the meeting so called, either in person or by lawful proxy, then and there shall elect by ballot thirteen directors for said corporation; and in such election each share of said capital stock shall entitle the owner thereof to one vote. The president and secretary of the board of commissioners, and, in case of their absence or inability, any two of the officers of said board, shall act as inspectors of said election, and shall certify under their hands the names of the directors elected at said meeting; and the said commissioners, treasurer, and secretary, shall then deliver over to said directors all the properties, subscription books, and other books in their possession, and thereupon the duties of said commissioners, and the officers previously appointed by them, shall cease and determine forever, and thereafter the stockholders shall constitute said body politic and corporate. Annual meetings of the stockholders of the said corporation for the choice of officers (when they are to be chosen) and for the transaction of business shall be holden at such time and place and upon such notice as may be prescribed in the by-laws.

Sec. 2. *And be it further enacted,* **That the right of way through the public lands be, and the same is hereby granted to said "Northern Pacific Railroad Company," its successors**

and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, and water-stations; and the right of way shall be exempt from taxation within the territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the [road] named in this bill.

Sec. 3. *And be it further enacted,* That there be, and hereby is, granted to the "Northern Pacific Railroad Company," its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preëmption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-

empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: *Provided,* That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided, further,* That the railroad company receiving the previous grant of land may assign their interest to said "Northern Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: *Provided, further,* That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road may be selected as above provided: *And provided, further,* That the word "mineral," when it occurs in this act, shall not be held to include iron or coal: *And provided, further,* That no money shall be drawn from the treasury of the United States to aid in the construction of the said "Northern Pacific Railroad."

Sec. 4. *And be it further enacted,* That whenever said "Northern Pacific Railroad Company" shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to, and coterminous with, said

completed section of said road; and, from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid: *Provided*, That not more than ten sections of land per mile, as said road shall be completed, shall be conveyed to said company for all that part of said railroad lying east of the western boundary of the State of Minnesota, until the whole of said railroad shall be finished and in good running order, as a first-class railroad, from the place of beginning on Lake Superior to the western boundary of Minnesota: *Provided, also*, That lands shall not be granted under the provisions of this act on account of any railroad, or part thereof, constructed at the date of the passage of this act.

Sec. 5. *And be it further enacted*, That said Northern Pacific Railroad shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations, and watering places, and all other appurtenances, including furniture, and rolling stock, equal in all respects to railroads of the first class, when prepared for business, with rails of the best quality, manufactured from American iron. And a uniform gauge shall be established throughout the entire length of the road. And there shall be constructed a telegraph line, of the most substantial and approved description, to be operated along the entire line: *Provided*, **That the said company shall not charge the government higher rates than they do individuals for like transportation and telegraphic service. And it shall be the duty of the Northern Pacific Railroad Company to permit any other railroad which shall be authorized to be built by the United States, or by the legislature of any territory or state in which the same may be situated, to form running connections with it, on fair and equitable terms.**

Sec. 6. *And be it further enacted,* That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or preëmption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting preëmption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale.

Sec. 7. *And be it further enacted,* **That the said "Northern Pacific Railroad Company" be, and is hereby, authorized and empowered to enter upon, purchase, take, and hold any lands or premises that may be necessary and proper for the construction and working of said road, not exceeding in width two hundred feet on each side of its railroad, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turnouts, standing places for cars, depots, station-houses, or any other structures required in the construction and working of said road. And the said company shall have the right to cut and remove trees and other material that might, by falling, encumber its road-bed, though standing or being more than two hundred feet from the line of said road.** And in case the owner of such lands or premises and the said company cannot agree as to the value of the premises taken, or to be taken, for the use of said road, the value thereof shall be determined by the appraisal of three disin-

terested commissioners, who may be appointed, upon application by either party, to any court of record in any of the territories in which the lands or premises to be taken lie; and said commissioners, in their assessment of damages, shall appriase such premises at what would have been the value thereof if the road had not been built. And upon return into court of such appraisement, and upon the payment into the same of the estimated value of the premises taken for the use and benefit of the owner thereof, said premises shall be deemed to be taken by said company, which shall thereby acquire full title to the same for the purposes aforesaid. And either party feeling aggrieved at said appraisement may, within thirty days after the same has been returned into court, file an appeal therefrom, and demand a jury of twelve men to estimate the damage sustained; but such appeal shall not interfere with the rights of said company to enter upon the premises taken, or to do any act necessary and proper in the construction of its road. And said party appealing shall give bonds, with sufficient surety or sureties, for the payment of any cost that may arise upon such appeal; and in case the party appealing does not obtain a verdict, increasing or diminishing, as the case may be, the award of the commissioners, such party shall pay the whole cost incurred by the appellee, as well as his own, and the payment into court, for the use of the owner of said premises taken, of a sum equal to that finally awarded, shall be held to vest in said company the title of said land, and of the right to use and occupy the same for the construction, maintenance, and operation of said road. And in case any of the lands to be taken, as aforesaid, shall be held by any infant, femme covert, non compos, insane person, or persons residing without the territory within which the lands to be taken lie, or persons subjected to any legal disability, the court may appoint a guardian for any party under any disqualification, to appear in proper person, who shall give bonds, with sufficient surety or sureties, for the proper and faithful execution of his trust, and who may represent in court the person dis-

qualified, as aforesaid, from appearing, when the same proceedings shall be had in reference to the appraisement of the premises to be taken for the use of said company, and with the same effect as has been already described; and the title of the company to the lands taken by virtue of this act shall not be affected or impaired by reason of any failure by any guardian to discharge faithfully his trust. And in case any party shall have a right or claim to any land for a term of years, or any interest therein, in possession, reversion, or remainder, the value of any such estate, less than a fee simple, shall be estimated and determined in the manner hereinbefore set forth. And in case it shall be necessary for the company to enter upon any lands which are unoccupied, and of which there is no apparent owner or claimant, it may proceed to take and use the same for the purposes of said railroad, and may institute proceedings, in manner described, for the purpose of ascertaining the value of, and of acquiring title to, the same; but the judge of the court hearing said suit shall determine the kind of notice to be served on such owner or owners, and he may in its discretion appoint an agent or guardian to represent such owner or owners in case of his or their incapacity or non-appearance. But in case no claimant shall appear within six years from the time of the opening of said road across any land, all claims to damages against said company shall be barred.

Sec. 8. *And be it further enacted*, That each and every grant, right, and privilege herein are so made and given to, and accepted by, said Northern Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the whole road by the fourth day of July, anno Domini eighteen hundred and seventy-six.

Sec. 9. *And be it further enacted*, That the United States make the several conditioned grants herein, and that

the said Northern Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States, by its congress, may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road.

Sec. 10. *And be it further enacted,* **That all people of the United States shall have the right to subscribe to the stock of the Northern Pacific Railroad Company until the whole capital named in this act of incorporation is taken up, by complying with the terms of subscription; and no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage, or lien made in any way, except by the consent of the congress of the United States.**

Sec. 11. *And be it further enacted,* **That said Northern Pacific Railroad, or any part thereof, shall be a post route and a military road, subject to the use of the United States, for postal, military, naval, and all other government service, and also subject to such regulations as congress may impose restricting the charges for such government transportation.**

Sec. 12. *And be it further enacted,* That the acceptance of the terms, conditions, and impositions of this act by the said Northern Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act, and not afterwards, and shall be served on the President of the United States.

Sec. 13. *And be it further enacted,* That the directors of said company shall make an annual report of their proceedings and expenditures, verified by the affidavits of the president and at least six of the directors, and they shall, from time to time, fix, determine, and regulate the fares,

tolls, and charges to be received and paid for transportation of persons and property on said road, or any part thereof.

Sec. 14. *And be it further enacted*, That the directors chosen in pursuance of the first section of this act shall, so soon as may be after their election, elect from their own number a president and vice-president; and said board of directors shall, from time to time, and so soon as may be after their election, choose a treasurer and secretary, who shall hold their offices at the will and pleasure of the board of directors. The treasurer and secretary shall give such bonds, with such security as the said board from time to time may require. The secretary shall, before entering upon his duty, be sworn to the faithful discharge thereof, and said oath shall be made a matter of record upon the books of said corporation. No person shall be a director of said Company unless he shall be a stockholder, and qualified to vote for directors at the election at which he shall be chosen.

Sec. 15. *And be it further enacted*, That the president, vice-president, and directors shall hold their offices for the period indicated in the by-laws of said company, not exceeding three years, respectively, and until others are chosen in their place, and qualified. In case it shall so happen that an election of directors shall not be made on any day appointed by the by-laws of said company, the corporation shall not for that excuse be deemed to be dissolved, but such election may be holden on any day which shall be appointed by the directors. The directors, of whom seven, including the president, shall be a quorum for the transaction of business, shall have full power to make and prescribe such by-laws, rules, and regulations as they shall deem needful and proper touching the disposition and management of the stock, property, estate, and effects of the company, the transfer of shares, the duties and conduct of their officers and servants touching the election and meeting of the directors, and all matters whatsoever which may appertain to the concerns of said company; and the

said board of directors may have full power to fill any vacancy or vacancies that may occur from any cause or causes from time to time in their said board. And the said board of directors shall have power to appoint such engineers, agents, and subordinates as may from time to time be necessary to carry into effect the object of the company, and to do all acts and things touching the location and construction of said road.

Sec. 16. *And be it further enacted,* That it shall be lawful for the directors of said company to require payment of the sum of ten per centum cash assessment upon all subscriptions received of all subscribers, and the balance thereof at such times and in such proportions and on such conditions as they shall deem to be necessary to complete the said road and telegraph line within the time in this act prescribed. Sixty days' previous notice shall be given of the payments required, and of the time and place of payment, by publishing a notice once a week in one daily newspaper in each of the cities of Boston, New York, Philadelphia, and Chicago; and in case any stockholder shall neglect or refuse to pay, in pursuance of such notice, the stock held by such person shall be forfeited absolutely to the use of the company, and also any payment or payments that shall have been made on account thereof, subject to the condition that the board of directors may allow the redemption on such terms as they may prescribe.

Sec. 17. *And be it further enacted,* That the said company is authorized to accept to its own use any grant, donation, loan, power, franchise, aid, or assistance which may be granted to, or conferred upon, said company by the congress of the United States, by the legislature of any state, or by any corporation, person, or persons; and said corporation is authorized to hold and enjoy any such grant, donation, loan, power, franchise, aid, or assistance, to its own use for the purpose aforesaid.

Sec. 18. *And be it further enacted,* That said Northern Pacific Railroad Company shall obtain the consent of the

legislature of any state through which any portion of said railroad line may pass, previous to commencing the construction thereof; but said company may have the right to put on engineers and survey the route before obtaining the consent of the legislature.

Sec. 19. *And be it further enacted,* That unless said Northern Pacific Railroad Company shall obtain bona fide subscriptions to the stock of said company to the amount of two millions of dollars, with ten per centum paid within two years after the passage and approval of this act, it shall be null and void.

Sec. 20. *And be it further enacted,* **That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military and other purposes, congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend, or repeal this act.**

Approved, July 2, 1864.

APPENDIX E

A Resolution Authorizing the Northern Pacific Railroad Company To Issue Its Bonds for the Construction of Its Road and To Secure the Same by Mortgage, and for Other Purposes [approved May 31, 1870, 16 Stat. 378].*

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That **the Northern Pacific Railroad Company be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation**; and, as proof and notice of its legal execution and effectual delivery, said mortgage shall be filed and recorded in the office of the Secretary of the Interior; and also to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted

---

*Provisions particularly pertinent to this appeal appear in bold face.

in the charter of said company of eighteen hundred and sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four. And that twenty-five miles of said main line between its western terminus and the city of Portland, in the State of Oregon, shall be completed by the first day of January, anno Domini eighteen hundred and seventy-two, and forty miles of the remaining portion thereof each year thereafter, until the whole shall be completed between said points: *Provided*, that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and preemption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre; and **if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceeding, or the mortgaged lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale**, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder: *Provided further*, That in the construction of the said railroad, American iron or steel only shall be used, the same to be manufactured from American ores exclusively.

Sec. 2. *And be it further resolved*, **That Congress may at any time alter or amend this joint resolution, having due regard to the rights of said company, and any other parties.**

Approved, May 31, 1870.

APPENDIX F

Proviso in "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-nine, and for other purposes," approved July 1, 1898, 30 Stat. 597 at 621.

And provided further, That nothing herein contained shall be construed as intended or having the effect to recognize the Northern Pacific Railway Company as the lawful successor of of Northern Pacific Railroad Company in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company, under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company in the courts of the United States, but the legal question whether the said Northern Pacific Railway Company is such lawful successor of the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provisions of this Act, and nothing in this Act shall be construed as enlarging the quantity of land which the said Northern Pacific Railroad Company is entitled to under laws heretofore enacted.

APPENDIX G

An Act to alter and amend an Act entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route," approved July 2, 1864, and to alter and amend a joint resolution entitled "Joint resolution authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road and to secure the same by mortgage, and for other purposes," approved May 31, 1870; to declare forfeited to the United States certain claimed rights asserted by the Northern Pacific Railroad Company, or the Northern Pacific Railway Company; to direct the institution and prosecution of proceedings looking to the adjustment of the grant, and for other purposes [approved June 25, 1929, 46 Stat. 41].*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any and all lands within the indemnity limits of the land grants made by Congress to the Northern Pacific Railroad Company under the Act of July 2, 1864, and the resolution of May 31, 1870, which, on June 5, 1924, were embraced within the exterior boundaries of any national forest or other Government reservation and which, in the event of a deficiency in the said land grants to the Northern Pacific Railroad Company upon the dates of the withdrawals of the said indemnity lands for governmental purposes, would be, or were, available to the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, by indemnity selection or otherwise in satisfaction of such deficiency in said land grants, are hereby taken out of and removed from the operation of

---

*Provisions particularly pertinent to this appeal appear in bold face type.

of the said land grants, and are hereby retained by the United States as part and parcel of the Government reservations wherein they are situate, relieved and freed from all claims if any exist, which the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, may have to acquire the said lands by indemnity selection or otherwise in satisfaction of the said land grants: *Provided*, That for any or all of the aforesaid indemnity lands hereby retained by the United States under this Act the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, or any subsidiary of either or both, or any subsidiary of a subsidiary of either or both, shall be entitled to and shall receive compensation from the United States to the extent and in the amounts, if any, the courts hold that compensation is due from the United States.

Sec. 2. That all of the unsatisfied indemnity selection rights, if any exist, claimed by the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, or any subsidiary of either or both, or any subsidiary of a subsidiary of either or both, or by any grantee or assignee of either or both, together with all claims to additional lands under and by virtue of the land grants contained in the Act of July 2, 1864, and resolution of May 31, 1870, or any other Acts of Congress supplemental or relating thereto, are hereby declared forfeited to the United States.

Sec. 3. **The rights reserved to the United States in the Act of July 2, 1864, to add to, alter, amend, or repeal said Act, and in the resolution of May 31, 1870, to alter or amend said resolution, are not to be considered as fully exercised, waived, or destroyed by this Act or the exercise of the authority conferred hereby**; and the passage of this Act shall not be construed as in anywise evidencing the purpose or intention of Congress to depart from the policy of the United States expressed in the resolution of May 31, 1870, relative to the disposition of granted lands by said

grantee, and the right is hereby reserved to the United States to, at any time, enact further legislation relating thereto.

Sec. 4. **The provisions of this Act shall not be construed as affecting the present title of the Northern Pacific Railroad Company or its successors, the Northern Pacific Railway Company, or any subsidiary of either or both, in the right of way of said road or lands actually used in good faith by the Northern Pacific Railway Company in the operation of said road.**

Sec. 5. **The Attorney General is hereby authorized and directed forthwith to institute and prosecute such suit, or suits, as may, in his judgment, be required to remove the cloud cast upon the title to lands belonging to the United States as a result of the claim of said companies, and to have all said controversies and disputes respecting the operation and effect of said grants, and actions taken under them, judicially determined,** and a full accounting had between the United States and said companies, and a determination made of the extent, if any, to which the said companies, or either of them, may be entitled to have patented to them additional lands of the United States in satisfaction of said grants, and as to whether either of the said companies is lawfully entitled to all or any part of the lands within the indemnity limits for which patents have not issued, and the extent to which the United States may be entitled to recover lands wrongfully patented or certified. In the judicial proceedings contemplated by this Act there shall be presented, and the court or courts shall consider, make findings relating to, and determine to what extent the terms, conditions, and covenants, expressed or implied, in said granting Acts have been performed by the United States, and by the Northern Pacific Railroad Company, or its successors, including the legal effect of the foreclosure of any and all mortgages which said Northern Pacific Railroad Company claims to have placed on said granted lands by virtue of authority conferred in the said

resolution of May 31, 1870, and the extent to which said proceedings and foreclosures meet the requirements of said resolution with respect to the disposition of said granted lands, and relative to what lands, if any, have been wrongfully or erroneously patented or certified to said companies, or either of them, as the result of fraud, mistake of law or fact, or through legislative or administrative misapprehension as to the proper construction of said grants or Acts supplemental or relating thereto, or otherwise, and the United States and the Northern Pacific Railroad Company, or the Northern Pacific Railway Company, or any other proper person, shall be entitled to have heard and determined by the court all questions of law and fact, and all other claims and matters which may be germane to a full and complete adjudication of the respective rights of the United States and said companies, or their successors in interest under said Act of July 2, 1864, and said joint resolution of May 31, 1870, and in other Acts or resolutions supplemental thereto, and all other questions of law and fact presented to the joint congressional committee appointed under authority of the joint resolution of Congress of June 5, 1924 (Forty-third Statutes, page 461), notwithstanding that such matters may not be specifically mentioned in this enactment.

Sec. 6. All lands received by the Northern Pacific Railroad Company or its successors, the Northern Pacific Railway Company, under said grants or Acts of Congress supplemental or relating thereto which have not been earned, but which have been, for any reason, erroneously credited or patented to either of said companies, or its, or their, successors, shall be fully accounted for by said companies, either by restitution of the land itself, where the said lands have not passed into the hands of innocent purchasers for value, or otherwise, in accordance with the findings and decrees of the courts. In fixing the amount, if any, the said companies are entitled to receive on account of the retention by the United States of indemnity lands within national forests and other Government reservations,

as by this enactment provided, the court shall determine the full value of the interest which may be rightfully claimed by said companies, or either of them, in said lands under the terms of said grants, and shall determine what quantities in lands or values said companies have received in excess of the full amounts they were entitled to receive, either as a result of breaches of the terms, conditions, or covenants, either expressed or implied, of said granting Acts by said companies, or either of them, or through mistake of law or fact, or through misapprehension as to the proper construction of said grants, or as a result of fraud, or otherwise, and said excess lands and values, if any, shall be charged against said companies in the judgment and decrees of said court. To carry out this enactment the court may render such judgments and decrees as law and equity may require.

Sec. 7. The suit, or suits, herein authorized shall be brought in a district court of the United States for some district within the States of Wisconsin, Minnesota, North Dakota, Montana, Idaho, Washington, or Oregon, and may be consolidated with any other actions now pending between the same parties in the same court involving the subject matter, and any such court shall in any such suit have jurisdiction to hear and determine all matters and things submitted to it in pursuance of the provisions of this Act, and in any such suit brought by the Attorney General hereunder any persons having an interest in or lien upon any lands included in the lands claimed by the United States, or by said companies, or any interest in the proceeds or avails thereof may be made parties. On filing the complaint in such cause, writs of subpoena may be issued by the court against any parties defendant, which writs shall run into any districts and shall be served, as any other like process, by the respective marshals of such districts. The judgment, or judgments, which may be rendered in said district court shall be subject to review on appeal by the United States circuit court of appeals for the circuit which includes the district in which the suit is brought, and

the judgment, or judgments, of such United States circuit court of appeals shall be reviewable by the Supreme Court of the United States, as in other cases. Any case begun in accordance with this Act shall be expedited in every way, and be assigned for hearing at the earliest practicable day in any court in which it may be pending. Congress shall be given a reasonable time, which shall be fixed by the court, within which it may enact such legislation and appropriate such sums of money as may be necessary to meet the requirements of any final judgment resulting by reason of the litigation herein provided for.

Sec. 8. It shall be the duty of the Attorney General to report to the Congress of the United States any final determinations rendered in such suit or proceedings, and the Attorney General, the Secretary of the Interior, and the Secretary of Agriculture shall thereafter submit to Congress recommendations for the enactment of such legislation, if any, as may be deemed by them to be desirable in the interests of the United States in connection with the execution of said decree or otherwise.

Sec. 9. That the Secretary of the Interior is hereby directed to withhold his approval of the adjustment of the Northern Pacific land grants under the Act of July 2, 1864, and the joint resolution of May 31, 1870, and other Acts relating thereto; and he is also hereby directed to withhold the issuance of any further patents and muniments of title under said Act and the said resolution, or any legislative enactments supplemental thereto, or connected therewith, until the suit or suits contemplated by this Act shall have been finally determined: *Provided*, That this Act shall not prevent the adjudication of any claims arising under the public land laws where the claimants are not seeking title through the grants to the Northern Pacific Railroad Company, or its successors, or any Acts in modification thereof or supplemental thereto.

Approved, June 25, 1929.

APPENDIX H

Excerpts from "An Act to incorporate the Texas Pacific Railroad Company, and to aid in the Construction of its Road, and for other Purposes," approved March 3, 1871, 16 Stat. 573.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That John C. Fremont, James L. Alcorn, G. M. Dodge . . . and all such persons as shall or may be associated with them, and their successors, are hereby created a body politic and corporate in fact and in law, by the name, style, and title of the Texas Pacific Railroad Company, and by that name shall have perpetual succession, and shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States, and may make and use a common seal; and the said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, from a point at or near Marshall, county of Harrison, State of Texas; thence by the most direct and eligible route, to be determined by said company, near the thirty-second parallel of north latitude, to a point at or near El Paso; thence by the most direct and eligible route, to be selected by said company, through New Mexico and Arizona, to a point on the Rio Colorado, at or near the southeastern boundary of the State of California; thence by the most direct and eligible route to San Diego, California, to ship's channel, in the bay of San Diego, in the State of California, pursuing in the location thereof, as near as may be, the thirty-second parallel of north latitude, and is hereby vested with all the powers, privileges, and immunities necessary to carry into effect the pur[po]ses of this act.

* * * * *

*Provisions particularly pertinent to this appeal appear in bold face type.

Sec. 3. That the capital stock of the Texas Pacific Railroad Company shall be fixed by the board of directors, at a sum not exceeding fifty millions of dollars, in shares of one hundred dollars; and **when the amount is so fixed, it shall never be increased except by consent of Congress.** . . .

Sec. 4. **That the said Texas Pacific Railroad Company shall have power and lawful authority to purchase the stock, land grants, franchises, and appurtenances of, and consolidate on such terms as may be agreed upon between the parties, with any railroad company or companies heretofore chartered by Congressional, State, or territorial authority, on the route prescribed in the first section of this act; but no such consolidation shall be with any competing through line of railroads to the Pacific Ocean.**

An Act to supplement certain provisions of Federal law incorporating the Texas and Pacific Railway Company in order to give certain additional authority to such company [approved July 10, 1962, 76 Stat. 142].*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in addition to the powers conferred by the Act entitled "An Act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes", approved March 3, 1871 (16 Stat. 573), as supplemented by the Act of May 2, 1872 (17 Stat. 59), the Act of March 3, 1873 (17 Stat. 598), the Act of June 22, 1874 (18 Stat. 197), and the Act of February 9, 1923 (42 Stat. 1223), **The Texas and Pacific Railway Company shall have the right and authority, subject to the provisions of the Interstate Commerce Act and any Acts supplemental thereto, to acquire securities or stock of, or property from, any other carrier.**

*Provisions particularly pertinent to this appeal appear in bold face type.

Sec. 2. **The capital stock of The Texas and Pacific Railway Company, heretofore fixed by its board of directors pursuant to the provisions of the Act of February 9, 1923, at $75,000,000 may be increased at any time in such amounts as do not result in more than $100,000,000 of such company's capital stock outstanding** and as are agreed to by resolution of its board of directors duly adopted in accordance with such company's bylaws and with the consent of the holders of a majority in amount of its then outstanding capital stock, expressed by vote in person or by proxy at a meeting of said stockholders called for the purpose upon such notice as such bylaws require. The provisions of the Act of February 9, 1923, with respect to the additional capital stock authorized by such Act (except with respect to the aggregate amount thereof), shall be applicable to the additional capital stock authorized by this Act and, in addition thereto, the par value of the capital stock of said company and the number of shares thereof shall, subject to the limitations of this Act, be in such amount as may be determined from time to time by resolution of such company's board of directors duly adopted in accordance with such company's bylaws and with the consent of the holders of a majority in amount of its then outstanding capital stock, expressed by vote in person or by proxy at a meeting of said stockholders called for the purpose upon such notice as such bylaws require.

Sec. 3. **All power and authority granted to The Texas and Pacific Railway Company by this Act, the Act incorporating such company, and Acts supplemental thereto, shall be subject to the provisions of the Interstate Commerce Act and any Acts supplemental thereto.**

Approved July 10, 1962.

APPENDIX I

Excerpts from Administrative Procedure Act as Revised and Now Codified

5 U.S.C. § 556(b) and (d) (80 Stat. 386)—formerly § 7(a) and (c) of the Administrative Procedure Act prior to its revision and codification—provide (emphasis supplied):

---

* * * * *

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. **The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner.** A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

* * * * *

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except

on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. **A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.** In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

---

5 U.S.C. § 557(c) (80 Stat. 387)—formerly § 8(b) of the Administrative Procedure Act prior to its revision and codification—provides (emphasis supplied):

* * * * *

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. **All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—**

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

---

5 U.S.C. § 706 (80 Stat. 393)—formerly § 10(a) of the Administrative Procedure Act prior to its revision and codification—provides (emphasis supplied):

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) **hold unlawful and set aside agency action, findings, and conclusions found to be—**

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) **in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;**

(D) **without observance of procedure required by law;**

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

APPENDIX J

Excerpts from Interstate Commerce Act

49 U.S.C. § 5(2)(a) and (b)—§5(2)(a) and (b) of the Interstate Commerce Act—provide in pertinent part (emphasis supplied):

(2) (a) **It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—**

(i) **for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership**; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) **Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission**, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the per-

sons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. **If the Commission finds that,** subject to such terms and conditions and such modifications as it shall find to be just and reasonable, **the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable.** . . .

* * * * *

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, **upon petition by such railroad or railroads requesting such inclusion,** and upon a finding that such inclusion is consistent with the public interest.

APPENDIX J

Excerpts from Interstate Commerce Act

49 U.S.C. § 5(2)(a) and (b)—§5(2)(a) and (b) of the Interstate Commerce Act—provide in pertinent part (emphasis supplied):

(2) (a) **It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—**

(i) **for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership**; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) **Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission**, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the per-

sons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. **If the Commission finds that,** subject to such terms and conditions and such modifications as it shall find to be just and reasonable, **the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable**. . . .

* * * * *

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, **upon petition by such railroad or railroads requesting such inclusion,** and upon a finding that such inclusion is consistent with the public interest.

APPENDIX K*

54th CONGRESS,
1st SESSION.

H. RES. 168.

IN THE HOUSE OF REPRESENTATIVES

April 11, 1896.

Mr. Hartman introduced the following joint resolution; which was referred to the Committee on the Judiciary and ordered to be printed.

JOINT RESOLUTION

To facilitate the reorganization of the Northern Pacific Railroad Company; to secure to actual settlers the right to purchase at a price not exceeding two dollars and fifty cents per acre the agricultural lands within its grant, and to prohibit said company or any successor company from giving by consolidation, sale, or other corporate action control of its railroad to any corporation, company, person, or association of persons owning, operating, or controlling a parallel or competing railroad.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, **That the purchasers of the railroad property of the Northern Pacific Railroad Company, which may at any time hereafter be sold at judicial sale in any suit or suits for the foreclosure of any of the mortgages heretofore executed by said company thereon, may organize anew by filing in the**

*Provisions particularly pertinent to this appeal appear in bold face type.

office of the Secretary of the Interior a copy of the deed or deeds conveying said railroad and property with a certificate, signed by a majority of them, setting forth the name adopted by them, the names, number, and residences, respectively, of its directors, and a copy of any plan of reorganization adopted by said purchasers or pursuant to which such purchase shall have been made. Upon filing such certificate such purchasers, their associates, successors, and assigns shall, by the name specified in said certificate, have and be invested with all the estate, right, title, and interest of said purchasers in and to such railroad and property, and shall possess franchises, rights, and powers the same as the Northern Pacific Railroad Company, and shall be subject to all the obligations and duties imposed by Congress upon said company, and may acquire and hold any property and branches of the Northern Pacific Railroad Company; and it may acquire and construct additional branches or feeders in any State as authorized by the laws thereof; and upon such terms and conditions as may be provided in the plan of reorganization filed aforesaid it may from time to time issue such bonds, secured by mortgage upon its property and franchises or otherwise, not exceeding in the aggregate the sum of one hundred and ninety million dollars, and twenty-five thousand dollars additional per mile for railroad hereafter constructed, and such stock preferred or common, as shall have been authorized by such plan: *Provided*, That except as such stock shall have been issued for property acquired under such plan, no additional stock shall be issued, except for money, labor, or property estimated at its actual cash value, to the par or face value of the stock, and that any such mortgage shall be filed and recorded in the office of the Secretary of the Interior as sufficient proof and notice of its legal execution and effectual delivery and of the lien thereby created: *Provided*, That such successor company, its successors and assigns, shall sell to any applicant therefor for purposes of actual settlement and cultivation in tracts of not less than forty nor more than one hundred and sixty acres each at a price not exceeding two dollars and fifty cents per acre, any agri-

cultural land, lying more than one mile from said railroad and then unsold, heretofore granted by Congress to the Northern Pacific Railroad Company and acquired by purchasers as aforesaid, but this proviso shall not apply to lands chiefly valuable for timber, coal, iron, or stone; and said company may reserve to itself, its successors and assigns, in the sale of any lands applied for hereunder, merchantable timber and stone not needed for building and fencing thereon, and all coal and iron which may be found therein, and the right to take therefrom gravel for its own uses: *Provided, however,* That said company shall have the right to reserve from sale hereunder and to otherwise dispose of such tracts or bodies of arid lands as it shall deem necessary or advisable for use in any way in promoting and developing irrigation, through companies or associations organized under and subject to the laws of the States in which such lands are situated: *And provided further,* That neither the Northern Pacific Railroad Company nor such successor corporation, its successors or assigns, shall consolidate its stock with or sell, convey, or lease said railway, or by other corporate action give control or management over and of the same, to any corporation, company, person, or association of persons owning, operating, or controlling a parallel and competing line of railway; and any contract entered into by said successor company in violation of the provisions hereof shall be null and void, and may be enjoined at the suit of the United States or any State in which said road or any part thereof is situate in any court of competent jurisdiction: *And provided also,* That nothing herein contained shall be construed as making any additional grant of lands to such successor corporation or as a waiver of any right of the United States now existing to enforce any forfeiture of lands heretofore granted to the said Northern Pacific Railroad Company or as in any manner affecting the vested rights of any settler or settlers on any of the lands heretofore granted to the Northern Pacific Railroad Company or of any purchaser or purchasers of any such lands from said company.